TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, ET AL., ETC., PETITIONERS,

vs.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1952
CERTIORARI GRANTED DECEMBER 15, 1952

SUPREME COURT OF THE UNITED STATES

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INDEX

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civ. 50-68

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD G. DOERLE and HERBERT R. JOHNSON, doing business under the firm name and style of Orvis Brothers & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York, Plaintiffs-Appellees,

AGAINST

J. HOWARD MCGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, Defendant-Appellant,

AND

W. A. JULIAN, Treasurer of the United States, Defendant

STATEMENT UNDER RULE XV

This action was commenced by the filing of a complaint on April 28, 1949. The original plaintiffs are those set forth in the caption hereof. By stipulation marked "so ordered" on October 7, 1949 the defendant, J. Howard McGrath, was substituted in place and stead of Tom C. Clark, former Attorney General of the United States.

[fol. 2] Pursuant to order entered herein February 19, 1951, the plaintiffs filed their supplemental complaint on February 26, 1951. The answer of the defendants to the original and supplemental complaints was filed on March 16, 1951. Defendants' notice of issue on their motion for judgment on the pleadings was filed on May 28, 1951. Plaintiffs' notice of issue on their cross-motion for summary judgment was filed on June 13, 1951.

Defendants were not arrested, no bail was taken and no property was attached or arrested.

The cause came on for hearing on June 19, 1951 before the Honorable Sidney Sugarman, District Judge, United States District Court for the Southern District of New

York. The Court denied the defendants' motion for judgment on the pleadings and granted the plaintiffs' motion for summary judgment. No written opinion was filed by the Court.

Final order and judgment was entered on November 1, 1951 granting plaintiffs' motion for summary judgment and denying defendants' motion for judgment on the pleadings. Defendant, J. Howard McGrath, filed notice of appeal from said final order and judgment on December 17, 1951.

[fol. 3] IN UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD G. DOERLE and HERBERT R. JOHNSON, doing business under the firm name and style of Orvis Brothers & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York, Plaintiffs,

AGAINST

TOM C. CLARK, Attorney General of the United States, as Successor to the Alien Property Custodian, and W. A. JULIAN, Treasurer of the United States, Defendants

COMPLAINT—Filed April 28, 1949

Plaintiffs, by Baer & Marks, their attorneys, for their complaint, allege as follows:

1. Plaintiffs Warner D. Orvis, Homer W. Orvis, Floyd Y. Keeler, F. Howard Smith, Harold A. Rousselot, Henry H. Balfour, J. Antonio Zalduondo, William G. Wigton, Clifford G. Doerle and Herbert R. Johnson are partners, doing business under the firm name and style of Orvis Brothers & Co. (hereinafter called "Orvis") as securities and commodities brokers with their principal office and place of business at No. 14 Wall Street, in the City, County [fol. 4] and State of New York. Henry H. Balfour, J. Antonio Zalduondo, William G. Wigton and Clifford G.

Doerle became partners of Orvis on and after January 1st, 1946 and have no interest in any recovery herein.

2. Plaintiff, John J. McCloskey, Jr., was at all times hereinafter mentioned and now is the City Sheriff of the City of New York.

3. Plaintiffs, and each of them, are nationals of the United States, and not enemies or allies of enemies.

4. This action arises under Section 9 of the Trading with the Enemy Act (U. S. Code, Title 50, Section 24), being an action for the establishment of plaintiffs' interest in property vested by the Alien Property Custodian and taken into his possession and for the return to plaintiffs of so much of said property as will satisfy plaintiffs' claim.

5. Upon information and belief, at all times mentioned herein, Anderson Clayton & Co. (hereinafter called "Acco"), was and now is a joint stock association organized and existing under the laws of the State of Texas, and duly qualified and licensed to do business in the State of New York, and maintains an office at 60 Beaver Street, in the City, County and State of New York.

6. Heretofore and on or about June 25, 1943, Orvis commenced an action in the Supreme Court of the State of New York, County of New York, against C. Itoh & Co., Ltd., Takenosuke Itoh and Sanko Kabusiki Kaisya (hereinafter called "Sanko"), to recover a sum of money, to wit: $19,796.85 and interest, against said defendants, said sum [fol. 5] being the balance due from said defendants to Orvis, as a result of transactions more specifically set forth in the complaint in said action. In said action a warrant of attachment in the usual form was duly granted and issued by the Honorable Morris Eder, one of the Justices of said Court, on or about June 25, 1943, by virtue of the fact that the defendants in said action were each non-residents of the State of New York, and residents and nationals of the Empire of Japan. Said warrant of attachment was directed to the City Sheriff of the City of New York, one of the plaintiffs in this action, and to the Sheriff of any County of the State of New York, and commanded said Sheriff to attach and safely keep so much of the property within the County of such Sheriff which the defendants in said action, or any of them, may have at any time before

final judgment in said action as would satisfy the plaintiffs' demand, together with costs and expenses.

7. On information and belief, prior to the commencement of said action, defendant Sanko succeeded to all of the assets and liabilities of defendant C. Itoh & Co. Ltd. and particularly, defendant Sanko assumed and took over all of the obligations of C. Itoh & Co. Ltd. to Orvis.

8. On or about June 28, 1943, John J. McCloskey, Jr., as City Sheriff of the City of New York, by virtue of and pursuant to the command of the aforesaid warrant of attachment duly levied upon property of Sanko within the County of New York, by serving upon Acco at its office at No. 60 Beaver Street, in the City, County and State of New York, a copy of said warrant of attachment duly certified by said Sheriff with notice of property attached [fol. 6] and demand for certificate pursuant to the Civil Practice Act. On or about June 28, 1943, two duplicate copies of said warrant of attachment were served by the Sheriff of Albany County upon the Secretary of State of the State of New York for and on behalf of Acco as the designated agent of said company, to receive service of process within the State of New York. Under the laws of the State of New York, the aforesaid service of process constituted a valid levy upon all of the property, both tangible and intangible, of Sanko in the possession, custody or control of Acco, including all indebtedness of Acco to Sanko existing as of June 28th, 1943, and Orvis thereby secured a valid and enforceable lien thereon.

9. Thereafter on or about August 3, 1943, plaintiffs were informed by the testimony of Acco on examination in aid of attachment, held pursuant to an order of the Honorable Benjamin F. Schreiber, one of the Justices of the Supreme Court of the State of New York, that at the time of said levy there was on the books of Acco an indebtedness to said Sanko in the sum of $5,975.07, which indebtedness arose out of sales of merchandise. Said indebtedness was shown on the books of Acco in an account carried in the name of Sanko.

10. On or about August 19, 1943, an order was duly granted by the Honorable William C. Hecht, Jr., one of the Justices of the Supreme Court of the State of New York,

County of New York, granting permission to Orvis to institute and maintain in the name of themselves and the City Sheriff of the City of New York jointly, any actions or proceedings which by the provisions of the Civil Prac-
[fol. 7] tice Act may be brought by said Sheriff for the purpose of collecting and recovering the debts and things in action attached by said Sheriff pursuant to the warrant of attachment above referred to.

11. On or about the 7th day of September, 1943 an action was commenced in aid of attachment pursuant to said order of August 19, 1943 to recover the sum of $5,975.07 with interest and costs. Said action in aid of attachment resulted in a judgment entered in the office of the Clerk of the County of New York on October 28, 19[illegible] in favor of the plaintiffs Orvis and John J. McCloskey, Jr., as City Sheriff of the City of New York and against the defendant Acco in the sum of $5,136.09, an offset in the sum of $874.48 having been allowed to defendant Acco against the indebtedness of $5,975.07 due to Sanko from Acco. Said judgment provided that plaintiffs should have execution therefor, provided that plaintiffs procure, prior to execution, such license as may be required by Executive Orders Nos. 8389 and 9193 as amended, authorizing defendant Acco to make payment. On or about November 20, 1946, plaintiffs filed with the Foreign Funds Control of the Treasury Department a formal application for a license to permit defendant Acco to make said payment to the Sheriff of the City of New York, in accordance with the terms of said judgment, but said application was denied on February 15th, 1947 for the reason that the consent of the Office of Alien Property, Department of Justice, was refused.

12. On or about June 27, 1947, the Office of Alien Property of the Department of Justice made an order desig-
[fol. 8] nated Vesting Order 9282 purporting to vest in the Attorney General of the United States the said debt owed to Sanko by Acco in the sum of $5,101.00, said sum representing the same indebtedness more particularly described in paragraph 9 hereof.

13. On or about July 18, 1947 pursuant to the provisions of the said Vesting Order 9282, Acco paid over to the Office

of Alien Property of the Department of Justice said sum of $5,100.59, and on information and belief, said sum is now held by defendant Tom C. Clark as Attorney General of the United States or by defendant W. A. Julian as Treasurer of the United States.

14. In the month of August, 1947, plaintiff Orvis was informed that on and prior to June 28, 1943, the date of the levy alleged in paragraph "8" herein, Acco was indebted to the said Sanko in the additional sum of $24,532.65, which indebtedness, upon information and belief, arose out of sales of merchandise, and that said indebtedness of $24,532.65 was due to said Sanko, in addition to the indebtedness of $5,975.07 alleged to have been due, in paragraph "9" herein.

15. Upon information and belief, on June 28, 1943, Acco was indebted to Sanko in said additional sum of $24,532.65 and there was no valid demand or offset of Acco against said indebtedness and said debt was due and payable by Acco to Sanko, and became subject to the lien of the levy made as more fully set forth in paragraph "8" hereof.

16. On or about July 18th, 1947, Acco paid over to the Office of Alien Property of the Department of Justice an [fol. 9] additional sum of $24,532.65 described as a pre-war balance of indebtedness of Acco to Sanko according to the Shanghai Branch books of Acco which had been transferred to Acco's head office in January, 1947. Said payment was made by Acco to the Office of Alien Property purportedly in accordance with Vesting Order No. 9282, which vesting order, however, did not purport to cover said balance of indebtedness of Acco to Sanko.

17. On or about November 25th, 1947, the Office of Alien Property of the Department of Justice made an order designated Vesting Order 10253, purporting to vest in the Attorney General of the United States cash in the amount of $24,532.65 then in the custody of the Attorney General of the United States in Account No. 39-21693, which monies had been paid by Acco to said Office of Alien Property on July 18, 1947 in purported compliance with Vesting Order No. 9282.

18. On or about February 20, 1948, an order was duly granted by Honorable Ferdinand Pecora, one of the Jus-

tices of the Supreme Court of the State of New York, County of New York, directing the Clerk of the County of New York to amend nunc pro tunc the judgment in favor of the plaintiff and against Acco entered October 28, 1946 by increasing the amount thereof from $5,136.09 to $29,633.24 and thereafter said judgment was duly amended nunc pro tunc as of October 28th, 1946 to provide that plaintiffs should recover of Acco the sum of $29,633.24 to be applied in satisfaction of the judgment entered in the Office of the Clerk of the County of New York on December 3, 1943 in favor of plaintiffs against Sanko in the [fol. 10] sum of $20,714.84 and interest together with Sheriff's fees and the costs and disbursements of the action against Acco theretofore taxed in the sum of $35.50.

19. Said judgment entered October 28th, 1946 as so amended nunc pro tunc remains wholly unpaid and plaintiffs have not received any monies on account thereof or on account of the judgment against Sanko entered in the Office of the Clerk of the County of New York on December 3, 1943 as above set forth.

20. On or about the 28th day of April, 1949, an order was duly granted by the Honorable John E. McGeehan, one of the Justices of the Supreme Court of the State of New York, County of New York, granting permission to Orvis to institute and maintain in its own name and in the name of the Sheriff of the City of New York, jointly, any actions or proceedings which by the provisions of the Civil Practice Act, may be brought by said Sheriff for the purpose of collecting and recovering the debts and things in action attached by said Sheriff, pursuant to the warrant of attachment above referred to. This action is instituted and maintained by plaintiffs pursuant to the provisions of said order.

21. On or about February 28, 1947, plaintiff Orvis filed a Notice of Claim with the Alien Property Custodian designated Claim No. 2022. Thereafter, the duties and obligations of the Alien Property Custodian were transferred to the Office of Alien Property of the Department of Justice.

22. Thereafter, the Office of Alien Property considered the claim filed by plaintiffs and, pursuant to its rules of

[fol. 11] procedure, treated said claim as an application for a retroactive license under Executive Order 8339 as amended, and on or about February 15th, 1949, made an order denying the application of plaintiffs for a retroactive license under Section 5(b) of the Trading with the Enemy Act.

23. By reason of said action of the Office of Alien Property in denying plaintiffs' application for a retroactive license, plaintiffs have been effectively denied their rights as attachment creditors under the laws of the State of New York, and the validity of plaintiffs' attachment lien under said laws has been impaired, prejudiced and destroyed.

24. Upon information and belief, the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted payment to be made from assets of alien enemies to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment, and by reason of the refusal, plaintiffs have been deprived of the equal protection of the laws in derogation of their constitutional rights.

25. Upon information and belief, the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted to be paid to unlicensed attachment creditors assets of enemy aliens which should have been marshalled for the payment of claims including that of plaintiffs, and by reason of the refusal to grant a license in this case, plaintiffs have been deprived of property without due process of law in derogation of their constitutional rights.

[fol. 12] 26. Upon information and belief, no interest of the United States of America is involved in the administration and distribution of the assets of Sanko vested or held by the Office of Alien Property, and the action of the Office of Alien Property, in denying plaintiffs' application for a retroactive license, is, in effect, the exercise of judicial power in excess of the authority and power of the Office of Alien Property and the Executive Branch of the Government.

27. By reason of the premises, plaintiffs have been de-

prived of a preference in the distribution of the assets of Sanko vested or held by the Office of Alien Property, and have been damaged in an amount which cannot be stated at the present time.

WHEREFORE, plaintiffs pray that this Court adjudge and decree:

1. That the plaintiffs herein acquired a lien upon the entire indebtedness of Acco to Sanko on June 28, 1943 prior and superior to that of the defendants, or either of them;

2. That the defendants, or either or them, hold the sum of $29,633.24 subject and subordinate to the attachment lien of the plaintiffs herein;

3. That Vesting Orders 9282 and 10253 are valid and effective only to the extent of any surplus of the property so vested after application thereof to the extent of plaintiffs' lien thereon in satisfaction of plaintiffs' claim.

[fol. 13] 4. That the defendants, or either of them, be directed to pay to the Sheriff of the City of New York such part of said sum of $29,633.24 as shall be necessary to satisfy the judgment obtained by plaintiffs against Sanko Kabusiki Kaisya and entered in the Office of the Clerk of the County of New York on December 3rd, 1943, together with interest thereon from said date, and the Sheriff's fees, and costs amounting to $35.50 taxed in the action against Anderson Clayton & Co.

5. That such payment to the Sheriff of the City of New York be applied to the satisfaction of the claim of plaintiffs, Sheriff's fees, and costs.

6. That plaintiffs be awarded such other and further relief as to the court may seem just and proper.

Baer & Marks, By (Signed) Donald Marks, Member of the Firm, Attorneys for Plaintiffs, Office & P. O. Address, 20 Exchange Place, Borough of Manhattan, City of New York.

[fol. 14] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER OF SUBSTITUTION—October 7, 1949

J. Howard McGrath having succeeded Tom C. Clark as Attorney General of the United States, it is hereby

Stipulated and agreed by and between the respective parties herein that J. Howard McGrath, Attorney General of the United States, as Successor to the Alien Property Custodian of the United States, be substituted as defendant in this action in the place and stead of Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, and that the title of this action be deemed amended accordingly.

John F. X. McGohey, United States Attorney; Attorney for Defendants. Baer & Marks, Attorneys for Plaintiffs.

So Ordered. Wm. Bondy, U. S. D. J.

[fol. 15] IN UNITED STATES DISTRICT COURT

CROSS-ORDER GRANTING PLAINTIFF'S PERMISSION TO FILE SUPPLEMENTAL COMPLAINT—Filed February 19, 1951

Plaintiffs having moved this Court for an order permitting plaintiffs to serve a supplemental complaint in the form annexed to the notice of motion, and said motion having regularly come on to be heard on December 16, 1950.

Now, on reading and filing plaintiff's notice of motion dated November 28, 1950, the affidavit of Donald Marks, sworn to November 28, 1950, and the proposed supplemental complaint annexed to said notice of motion, with proof of due service thereof, and upon the complaint and all prior proceedings had herein, in support of the said motion, and after hearing Baer & Marks (Arthur M. Bullowa, of counsel), attorneys for plaintiffs, in support of the motion, and Irving H. Saypol, United States Attorney, (Leon Yudkin, of counsel), in opposition thereto, and due deliberation having been had thereon, and the decision of the Court having been filed, it is

Ordered, that plaintiffs' motion be and the same hereby is in all respects granted; and it is further

Ordered, that plaintiffs be and hereby are granted permission to file and serve a supplemental complaint in the form annexed to the notice of motion; and it is further

[fol. 16] Ordered that the defendants are hereby given twenty days from the date of service of the said supplemental complaint upon the defendants within which to answer the original and supplemental complaint.

Dated: New York, N. Y., February 13, 1951.

Sidney Sugarman, United States District Judge.

[fol. 17] In United States District Court

Supplemental Complaint

Plaintiffs, by Baer & Marks, their attorneys, for their supplemental complaint, allege as follows:

1. Plaintiffs Warner D. Orvis, Homer W. Orvis, Floyd Y. Keeler, F. Howard Smith, Harold A. Rousselot, Henry H. Balfour, J. Antonio Zalduondo, William G. Wigton, Clifford G. Doerle and Herbert R. Johnson are partners, doing business under the firm name and style of Orvis Brothers & Co. (hereinafter called "Orvis") as securities and commodities brokers with their principal office and place of business at No. 14 Wall Street, in the City, County and State of New York, Henry H. Balfour, J. Antonio Zalduondo, William G. Wigton and Clifford G. Doerle became partners of Orvis on and after January 1st, 1946 and have no interest in any recovery herein.

2. Plaintiff, John J. McCloskey, Jr., was at all times hereinafter mentioned and now is the City Sheriff of the City of New York.

3. Plaintiffs, and each of them, are nationals of the United States and not enemies or allies of enemies.

4. This action arises under Section 9 of the Trading with the Enemy Act (U. S. Code, Title 50, Section 24), [fol. 18] being an action for the establishment of plaintiff's interest in property vested by the Alien Property Custodian and taken into his possession and for the return

to plaintiffs of so much of said property as will satisfy plaintiffs' claim.

5. Upon information and belief, at all times mentioned herein, Anderson Clayton & Co. (hereinafter called "Acco"), was and now is a joint stock association, organized and existing under the laws of the State of Texas, and duly qualified and licensed to do business in the State of New York, and maintains an office at 60 Beaver Street, in the City, County and State of New York.

6. Heretofore and on or about June 25, 1943, Orvis commenced an action in the Supreme Court of the State of New York, County of New York, against C. Itoh & Co. Ltd., Takenosuke Itoh and Sanko Kabusiki Kaisya (hereinafter called "Sanko"), to recover a sum of money, to wit: $19,796.85 and interest, against said defendants, said sum being the balance due from said defendants to Orvis, as a result of transactions more specifically set forth in the complaint in said action. In said action a warrant of attachment in the usual form was duly granted and issued by the Honorable Morris Eder, one of the Justices of said Court, on or about June 25, 1943, by virtue of the fact that the defendants in said action were each non-residents of the State of New York, and residents and nationals of the Empire of Japan. Said warrant of attachment was directed to the City Sheriff of the City of New York, one of the plaintiffs in this action, and to the Sheriff of any County of the State of New York, and commanded said [fol. 19] Sheriff to attach and safely keep so much of the property within the County of such Sheriff which the defendants in said action, or any of them, may have at any time before final judgment in said action as would satisfy the plaintiffs' demand, together with costs and expenses.

7. On information and belief, prior to the commencement of said action, defendant Sanko succeeded to all of the assets and liabilities of defendant C. Itoh & Co. Ltd. and particularly, defendant Sanko assumed and took over all of the obligations of C. Itoh & Co. Ltd. to Orvis.

8. On or about June 28, 1943, John J. McCloskey, Jr., as City Sheriff of the City of New York, by virtue of and pursuant to the command of the aforesaid warrant of attachment duly levied upon property of Sanko within the

County of New York, by serving upon Acco at its office at No. 60 Beaver Street, in the City, County and State of New York, a copy of said warrant of attachment duly certified by said Sheriff with notice of property attached and demand for certificate pursuant to the Civil Practice Act. On or about June 28th, 1943, two duplicate copies of said warrant of attachment were served by the Sheriff of Albany County upon the Secretary of State of the State of New York for and on behalf of Acco as the designated agent of said company, to receive service of process within the State of New York. Under the laws of the State of New York, the aforesaid service of process constituted a valid levy upon all of the property, both tangible and intangible, of Sanko in the possession, custody or control of Acco, including all indebtedness of Acco to Sanko existing as of June 28th, 1943, and Orvis thereby secured a valid and enforceable lien thereon.

[fol. 20] 9. Thereafter, on or about August 3, 1943, plaintiffs were informed by the testimony of Acco on examination in aid of attachment, held pursuant to an order of the Honorable Benjamin F. Schreiber, one of the Justices of the Supreme Court of the State of New York, that at the time of said levy there was on the books of Acco an indebtedness to said Sanko in the sum of $5,975.07, which indebtedness arose out of sales of merchandise. Said indebtedness was shown on the books of Acco in an account carried in the name of Sanko.

10. On or about August 19, 1943, an order was duly granted by the Honorable William C. Hecht, Jr., one of the Justices of the Supreme Court of the State of New York, County of New York, granting permission to Orvis to institute and maintain in the name of themselves and the City Sheriff of the City of New York jointly, any actions or proceedings which by the provisions of the Civil Practice Act may be brought by said Sheriff for the purpose of collecting and recovering the debts and things in action attached by said Sheriff pursuant to the arrant of attachment above referred to.

11. On or about the 7th day of September, 1943, an action was commenced in aid of attachment pursuant to said order of August 19, 1943 to recover the sum of $5,975.07

with interest and costs. Said action in aid of attachment resulted in a judgment entered in the office of the Clerk of the County of New York on October 28th, 1946 in favor of the plaintiffs Orvis and John J. McCloskey, Jr., as City Sheriff of the City of New York and against the defendant Acco in the sum of $5,136.09, an offset in the sum of $874.48 [fol. 21] having been allowed to defendant Acco against the indebtedness of $5,975.07 due to Sanko from Acco. Said judgment provided that plaintiffs should have execution therefor, provided that plaintiffs procure, prior to execution, such license as may be required by Executive Orders Nos. 8389 and 9193 as amended, authorizing defendant Acco to make payment. On or about November 20, 1946, plaintiffs filed with the Foreign Funds Control of the Treasury Department a formal application for a license to permit defendant Acco to make said payment to the Sheriff of the City of New York, in accordance with the terms of said judgment, but said application was denied on February 15th, 1947 for the reason that the consent of the Office of Alien Property, Department of Justice, was refused.

12. On or about June 27, 1947, the Office of Alien Property of the Department of Justice made an order designated Vesting Order 9282 purporting to vest in the Attorney General of the United States the said debt owed to Sanko by Acco in the sum of $5,101.00, said sum representing the same indebtedness more particularly described in paragraph 9 hereof.

13. On or about July 18, 1947 pursuant to the provisions of the said Vesting Order 9282, Acco paid over to the Office of Alien Property of the Department of Justice said sum of $5100.59, and on information and belief, said sum is now held by defendant J. Howard McGrath, as Attorney General of the United States, or by defendant W. A. Julian as Treasurer of the United States.

14. In the month of August, 1947, plaintiff Orvis was informed that on and prior to June 28, 1943, the date of the [fol. 22] levy alleged in paragraph "8" herein, Acco was indebted to the said Sanko in the additional sum of $24,532.65, which indebtedness, upon information and belief, arose out of sales of merchandise, and that said indebtedness of $24,532.65 was due to said Sanko, in addition to the

indebtedness of $5,975.07 alleged to have been due in paragraph "9" herein.

15. Upon information and belief, on June 28, 1943, Acco was indebted to Sanko in said additional sum of $24,532.65 and there was no valid demand or offset of Acco against said indebtedness and said debt was due and payable by Acco to Sanko, and became subject to the lien of the levy made as more fully set forth in paragraph "8" hereof.

16. On or about July 18th, 1947, Acco paid over to the Office of Alien Property of the Department of Justice an additional sum of $24,532.65 described as a pre-war balance of indebtedness of Acco to Sanko according to the Shanghai Branch books of Acco which had been transferred to Acco's head office in January, 1947. Said payment was made by Acco to the Office of Alien Property purportedly in accordance with Vesting Order No. 9282, which vesting order, however, did not purport to cover said balance of indebtedness of Acco to Sanko.

17. On or about November 25th, 1947, the Office of Alien Property of the Department of Justice made an order designated Vesting Order 10253, purporting to vest in the Attorney General of the United States cash in the amount of $24,532.65 then in the custody of the Attorney General of the United States in Account No. 39-21693, which monies [fol. 23] had been paid by Acco to said Office of Alien Property on July 18th, 1947 in purported compliance with Vesting Order No. 9282.

18. On or about February 20, 1948, an order was duly granted by Honorable Ferdinand Pecora, one of the Justices of the Supreme Court of the State of New York; County of New York, directing the Clerk of the County of New York to amend nunc pro tunc the judgment in favor of the plaintiffs and against Acco entered October 28, 1946 by increasing the amount thereof from $5,136.09 to $29,633.24 and thereafter said judgment was duly amended nunc pro tunc as of October 28th, 1946 to provide that plaintiffs should recover of Acco the sum of $29,633.24 to be applied in satisfaction of the judgment entered in the Office of the Clerk of the County of New York on December 3, 1943 in favor of plaintiffs against Sanko in the sum of $20,714.84 and interest together with Sheriff's fees and

the costs and disbursements of the action, against Acco theretofore taxed in the sum of $35.50.

19. Said judgment entered October 28, 1946 as so amended nunc pro tunc remains wholly unpaid and plaintiffs have not received any monies on account thereof or on account of the judgment against Sanko entered in the Office of the Clerk of the County of New York on December 3, 1943 as above set forth.

20. On or about the 28th day of April, 1949, an order was duly granted by the Honorable John E. McGeehan, one of the Justices of the Supreme Court of the State of New York, County of New York, granting permission to Orvis to institute and maintain in its own name and in the [fol. 24] name of the Sheriff of the City of New York, jointly, any actions or proceedings which by the provisions of the Civil Practice Act, may be brought by said Sheriff for the purpose of collecting and recovering the debts and things in action attached by said Sheriff, pursuant to the warrant of attachment above referred to. This action is instituted and maintained by plaintiffs pursuant to the provisions of said order.

21. On or about February 28, 1947, plaintiff Orvis filed a Notice of Claim with the Alien Property Custodian designated Claim No. 2022. Thereafter, the duties and obligations of the Alien Property Custodian were transferred to the Office of Alien Property of the Department of Justice.

22. Thereafter, the Office of Alien Property considered the claim filed by plaintiffs and, pursuant to its rules of procedure, treated said claim as an application for a retroactive license under Executive Order 8339 as amended, and on or about February 15th, 1949, made an order denying the application of plaintiffs for a retroactive license under Section 5(b) of the Trading with the Enemy Act.

23. Thereafter, on April 27th, 1949, a motion was made by the Chief of the Claims Branch of the Office of Alien Property to dismiss the claim filed by plaintiffs on the ground that it appeared from the notice of claim and the order of the Director denying the application for a retroactive license that the claimants were not, within the meaning of Section 32(a) of the Trading with the Enemy Act, as amended, the owners of the property or interest de-

scribed in the Notice of Claim immediately prior to its [fol. 25] vesting or transfer to the Alien Property Custodian, or the legal representatives, or successors in interest by inheritance, devise, bequest, or operation of law, of such owner. By an order dated June 23rd, 1949, the Hearing Examiner granted said motion and dismissed plaintiffs' claim to the extent that it was a title claim. Thereafter, on June 29th, 1949, plaintiffs filed a petition to review the decision of said Hearing Examiner, and the petition for review was granted by the Director of the Office of Alien Property by order dated October 10th, 1949, in which the review was limited to the effect of the unlicensed attachment. Thereafter, by an order dated October 19, 1950, the Director of the Office of Alien Property affirmed the decision of the Hearing Examiner.

24. By reason of said action of the Office of Alien Property in denying plaintiffs' application for a retroactive license and in dismissing plaintiffs' claim as a title claim, and by reason of the action of the Director of the Office of Alien Property affirming said dismissal, plaintiffs have been effectively denied their rights as attachment creditors under the laws of the State of New York, and the validity of plaintiffs' attachment lien under said laws has been impaired, prejudiced and destroyed.

25. Upon information and belief, the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted payment to be made from assets of alien enemies to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment, and by reason [fol. 26] of the refusal, plaintiffs have been deprived of the equal protection of the laws in derogation of their constitutional rights.

26. Upon information and belief, the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted to be paid to unlicensed attachment creditors assets of enemy aliens which should have been marshalled for the payment of claims including that of plaintiffs, and by reason of the refusal to grant a license in this case, plaintiffs have been deprived of prop-

erty without due process of law in derogation of their constitutional rights.

27. By reason of the actions taken within the office of Alien Property as above alleged, plaintiffs have exhausted their administrative remedies.

28. Upon information and belief, no interest of the United States of America is involved in the administration and distribution of the assets of Sanko vested or held by the Office of Alien Property, and the action of the Office of Alien Property, in denying plaintiffs' application for a retroactive license, is, in effect, the exercise of judicial power in excess of the authority and power of the office of Alien Property and the Executive Branch of the Government.

29. By reason of the premises, plaintiffs have been deprived of a preference in the distribution of the assets of Sanko vested or held by the Office of Alien Property, and have been damaged in an amount which cannot be stated at the present time.

[fol. 27] Wherefore, plaintiffs pray that this Court adjudge and decree:

1. That the plaintiffs herein acquired a lien upon the entire indebtedness of Acco to Sanko on June 28, 1943 prior and superior to that of the defendants, or either of them;

2. That the defendants, or either of them, hold the sum of $29,633.24 subject and subordinate to the attachment lien of the plaintiffs herein;

3. That Vesting Orders 9282 and 10283 are valid and effective only to the extent of any surplus of the property so vested after application thereof to the extent of plaintiffs' lien thereon in satisfaction of plaintiffs' claim.

4. That the defendants, or either of them, be directed to pay to the Sheriff of the City of New York such part of said sum of $29,633.24 as shall be necessary to satisfy the judgment obtained by plaintiffs against Sanko Kabusiki Kaisya and entered in the Office of the Clerk of the County of New York on December 3rd, 1943, together with interest thereon from said date, and the Sheriff's fees,

and costs amounting to $35.50 taxed in the action against Anderson Clayton & Co.

5. That such payment to the Sheriff of the City of New York be applied to the satisfaction of the claim of plaintiffs, Sheriff's fees, and costs.

[fol. 28] 6. That plaintiffs be awarded such other and further relief as to the court may seem just and proper.

Baer & Marks, by (Signed) Donald Marks, Member of the Firm, Attorneys for Plaintiffs, Office & P. O. Address, 20 Exchange Place, Borough of Manhattan, City of New York.

[fol. 29] IN UNITED STATES DISTRICT COURT

ANSWER

Defendants for their answer to the original and supplemental complaints as contained in the pleading denominated supplemental complaint;

1. Admits the allegations contained in paragraphs 2, 4, 6, 9, 10, 11, 12, 13, 16, 17, 18, 20, 22, 23, and 27.

2. Deny each and every allegation contained in paragraphs 24, 26, and 28.

3. Deny any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 3, 5, 14, and 19.

4. Admit the allegation in paragraph 7 that "prior to the commencement of said action, defendant Sanko succeeded to all of the assets and liabilities of defendant C. Itoh & Co., Ltd." and except as thus expressly admitted, deny any knowledge or information sufficient to form a belief as to the truth of each and every other allegation in that paragraph.

5. Admit the allegations contained in the first two sentences of paragraph 8 except deny the allegation therein that the attachment was "duly levied," and, except as thus [fol. 30] expressly admitted and denied, deny each and every other allegation in that paragraph.

6. Admit the allegations contained in paragraph 15 that:

> On June 28, 1943, Acco was indebted to Sanko in said additional sum of $24,532.65 * * * and said debt was due and payable by Acco to Sanko, * * *

and except as thus expressly admitted, deny any knowledge or information sufficient to form a belief as to the truth of the allegation that "there was no valid demand or offset of Acco against said indebtedness," and deny each and every other allegation contained in that paragraph.

7. Admit the allegations contained in paragraph 21 that "plaintiff Orvis filed a Notice of Claim with the Office of Alien Property Custodian designated Claim No. 2022" and that "the duties and obligations of the Alien Property Custodian were transferred to the Office of Alien Property of the Department of Justice" and, except as thus expressly admitted, deny each and every other allegation in that paragraph.

8. Admit the allegation in paragraph 25 that:

> * * * the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted payment to be made from assets of alien enmies to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment. * * *

and, except as thus expressly admitted, deny each and every other allegation in that paragraph.

[fol. 31] 9. Admit that plaintiffs were not granted a preference in the distribution of the assets of Sanko vested by the Office of Alien Property, but deny that they have been deprived of such a preference, as alleged in paragraph 29, for the reason that plaintiffs have no right to such a preference, and, except as thus expressly admitted and denied, deny each and every other allegation in that paragraph.

Wherefore, defendants pray for judgment dismissing this action with costs.

Harold I. Baynton, Assistant Attorney General,
Irving R. Saypol, United States Attorney, Southern District of New York, United States Court

House, Foley Square, New York 7, New York, By Lawrence G. Greene, Assistant United States Attorney, James D. Hill, Daniel G. McGrath, Leon Yudkin, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for Defendants.

[fol. 32] In United States District Court

Notice of Motion by Defendants for Judgment of the Pleadings

Please take notice that the undersigned will move the Court at Room 506, United States Court House, Foley Square, New York, New York, on the 15th day of June, 1951, at 10:30 a. m., or as soon thereafter as counsel can be heard, to enter a judgment on the pleadings in favor of defendants herein on the ground that there is no issue as to any material fact and defendants are entitled to judgment as a matter of law.

Irving H. Saypol, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York, Attorney for Defendants.

[fol. 33] In United States District Court

Notice of Cross-Motion by Plaintiffs for Summary Judgment—June 4, 1951

Sir:

Please take notice that upon the annexed affidavit of F. Howard Smith, sworn to the 6th day of June, 1951, and upon the supplemental complaint and answer and all prior proceedings had herein, plaintiffs will make a cross-motion at a motion term of this Court to be held at the Courthouse thereof at Foley Square, Borough of Manhattan, City, State and County of New York, on the 15th day of June, 1951, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order pursuant to

Rule 56 of the Rules of Civil Procedure, granting plaintiffs summary judgment for the relief requested in the supplemental complaint and for such other, further and different relief as the Court may deem just and proper.

Dated: New York, June 4, 1951.

Baer, Marks, Friedman, Berliner & Klein, Attorneys for Plaintiffs, 20 Exchange Place, New York 5, N. Y.

[fol. 34] AFFIDAVIT OF F. HOWARD SMITH ANNEXED TO NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss.:

F. HOWARD SMITH, being duly sworn, deposes and says:

I am a partner of Orvis Brothers & Co. and am familiar with the facts upon which this action is based and the prior proceedings had herein.

I make this affidavit in support of a cross-motion for summary judgment on the ground that there is no genuine issue as to any material fact and the plaintiffs are entitled to judgment as a matter of law.

Orvis Brothers & Co., are securities and commodities brokers with a principal office and place of business at 14 Wall Street in the City of New York. All of the partners thereof are United States citizens, and none are, or ever have been, of enemy nationality.

Prior to April 18, 1934 C. Itoh & Co., Ltd. had an account with Orvis Brothers & Co. for the purchase and sale of cotton futures contracts on the New York Cotton Exchange. In or about the month of March 1934 Takenosuke Itoh was elected a member of the New York Cotton Exchange. Takenosuke Itoh and C. Itoh & Co. requested Orvis Broth-
[fol. 35] ers & Co. to open an account in the name of Takenosuke Itoh and to execute orders for the purchase and sale of cotton futures contracts on the New York Cotton Exchange for the account of Takenosuke Itoh. C. Itoh & Co. agreed, in consideration of Orvis Brothers & Co. opening this account and executing orders and carrying contracts in said account without the deposit of original mar-

gin, to guarantee to Orvis Brothers & Co. the payment of any monies which may become due to Orvis Brothers & Co. by Takenosuke Itoh. Said guarantee of C. Itoh & Co. was in writing, dated April 18, 1934 and subsequently another guarantee by C. Itoh & Co. was forwerded to Orvis Brothers & Co. under date of August 24, 1934.

Orvis Brothers & Co. executed orders for the purchase and sale of cotton futures contracts on the New York Cotton Exchange, deposited margins with the New York Cotton Clearing Association, paid variation margins on open contracts to said Clearing Association and paid losses on closed out contracts, all in connection with the purchase and sale of cotton futures contracts for the account of Takenosuke Itoh. All of said orders were taken and deposits made and losses paid in reliance upon the guarantee of C. Itoh & Co., Ltd.

All of the open contracts carried in the account of Takenosuke Itoh were closed out in March 1938 and the balance due to Orvis Brothers & Co. on March 31, 1938 was $43,341.37.

On January 10, 1940 Takenosuke Itoh wrote to Orvis Brothers & Co., acknowledging the indebtedness and promising to liquidate the same at the earliest possible opportunity. Because of Japanese Government restrictions it was not possible to liquidate the balance due at that time. [fol. 36] Thereafter, remittances from Takenosuke Itoh and C. Itoh & Co., Ltd. and collections effected by Orvis Brothers & Co. reduced the balance due to Orvis Brothers & Co. to $19,796.85.

Sanko Kabusiki Kaisya, hereinafter referred to as "Sanko", is a Japanese corporation which formed an amalgamation with, and assumed all of the obligations of C. Itoh & Co., Ltd. Orvis Brothers & Co. were so advised by cable dated November 8, 1941. The cablegram was afterwards confirmed by a printed communication.

Orvis Brothers & Co. commenced an action to recover the sum then due in this account by procuring a warrant dated June 25, 1943. At the date of the application for said warrant the indebtedness in the account of Takenosuke Itoh with Orvis Brothers & Co., which indebtedness was

guaranteed by C. Itoh & Co. and its successor, Sanko, was in the amount of $19,796.85 with interest from May 1, 1943.

All subsequent proceedings herein set forth are based upon the warrant of attachment dated June 25, 1943.

A levy was made under said warrant of attachment on June 28, 1943 upon funds of the defendant Sanko in the possession of Anderson, Clayton & Co. Anderson, Clayton & Co. is a joint stock association organized under the laws of Texas and licensed to do business in New York. Anderson, Clayton & Co. maintain an office in New York City at 60 Beaver Street. On or about June 28, 1943 two duplicate copies of the warrant were served upon the Secretary of State of the State of New York, as the designated agent of Anderson, Clayton & Co. to receive service of process.

Orvis Brothers & Co. were informed, and an examination in aid of attachment disclosed, that there was on the books of Anderson, Clayton & Co. an indebtedness to Sanko in [fol. 37] the sum of $5,975.07. The testimony of an officer of Anderson, Clayton & Co. on examination in aid of attachment disclosed that said sum of $5,975.07 represented a debt due to Sanko on the books of Anderson, Clayton & Co. in Houston, Texas. An offset of $874.48 was claimed by Anderson, Clayton & Co. Said offset represented a debt due by Sanko to Anderson, Clayton & Co. arising from transactions in Bombay, India.

The action in aid of attachment resulted in the entry of a judgment in favor of Orvis Brothers & Co. and the Sheriff of the City of New York against Anderson, Clayton & Co. in the sum of $5,136.09 on October 28, 1946. Said sum was arrived at after allowing to Anderson, Clayton & Co. the offset in the sum of $874.48.

On December 3, 1943 judgment was entered in favor of Orvis Brothers & Co. against Sanko in the sum of $20,714.84.

The judgment entered in the action in aid of attachment provided that plaintiffs should have execution therefor if a license were obtained to effect compliance with Executive Orders Nos. 8389 and 9193 as amended.

Application for a license to authorize Anderson, Clayton & Co. to make payment was denied on February 15, 1947 for the reason that the consent of the Office of Alien Property of the Department of Justice was refused.

On June 27, 1947 the Office of Alien Property made an

order designated Vesting Order 9282, purporting to vest in the Attorney-General of the United States the debt owed to Sanko by Anderson, Clayton & Co. in the sum of $5,101.00. On July 18, 1947 the sum of $5,100.59 was paid over by Anderson, Clayton & Co. to the Office of Alien Property in compliance with said vesting order.

[fol. 38] In August 1947 Orvis Brothers & Co. learned that on June 28, 1943, the date of the levy on Anderson, Clayton & Co., the said Anderson, Clayton & Co. was indebted to Sanko in the additional sum of $24,532.65. Anderson, Clayton & Co. forwarded said additional sum to the Office of Alien Property with a letter dated July 18, 1947 which describes said additional sum as a "pre-war balance per our Shanghai branch books, transferred to head Office in January 1947." A copy of said letter is annexed hereto and marked Exhibit A. Thereafter, on November 25, 1947, the Office of Alien Property of the Department of Justice made an order designated Vesting Order 10253, purporting to vest in the Attorney-General of the United States said sum of $24,532.65 then in the custody of the Attorney-General of the United States.

On February 17, 1948 Orvis Brothers & Co. and the Sheriff of the City of New York obtained an order to show cause directed to Anderson, Clayton & Co. requiring said Anderson, Clayton & Co. to show why an order should not be made amending the amount of the judgment made and entered on October 28, 1946 to conform to the facts subsequently discovered with respect to the balance due from Anderson, Clayton & Co. to Sanko on June 28, 1943. The papers upon which said order was granted included a stipulation between the attorneys for Orvis Brothers & Co. and the Sheriff of the City of New York and the attorneys for Anderson, Clayton & Co., setting forth the newly discovered facts with respect to said net balance in favor of Sanko in the sum of $24,332.65. A copy of said stipulation is annexed hereto and marked Exhibit B.

On or about February 20, 1948 an order was made in said action in aid of attachment directing the Clerk of [fol. 39] the County of New York to amend nunc pro tunc the judgment in favor of plaintiffs and against Anderson, Clayton & Co. entered October 28, 1946 by increasing the

amount thereof from $5,136.09 to $29,633.24 and thereafter said judgment was duly amended nunc pro tunc as of October 28, 1946 to provide that plaintiffs should recover of Anderson, Clayton & Co. the sum of $29,633.24 to be applied in satisfaction of the judgment entered in the Office of the Clerk of New York County on December 3, 1943 in favor of Orvis Brothers & Co. against Sanko in the sum of $20,714.84 with interest and Sheriff's fees and costs and disbursements.

Said judgment, entered on October 28, 1946 as so amended nunc pro tunc, and the judgment entered on December 3, 1943 in favor of Orvis Brothers & Co. and against Sanko have not been paid. Orvis Brothers & Co. have not received any monies on account thereof.

On April 28, 1949 Orvis Brothers & Co. obtained permission by an order of the Supreme Court of the State of New York to institute and maintain in their own name and in the name of the Sheriff of the City of New York any actions or proceedings which may be brought for the purpose of collecting and recovering debts attached by the Sheriff pursuant to the warrant of attachment referred to above. This action under Section 9 of the Trading with the Enemy Act was commenced pursuant to said order to establish the right of Orvis Brothers & Co. to a preference in the liquidation of property of Sanko vested by the Alien Property Custodian.

On February 28, 1947 Orvis Brothers & Co. filed a notice of claim with the Alien Property Custodian and thereafter pursued the remedies available within the Office of [fol. 40] Alien Property. The Office of Alien Property considered the claim filed by Orvis Brothers & Co. and treated it as an application for a retroactive license under Executive Order 8389, as amended, and denied said application. Subsequently, the Chief of the Claims Branch of the Office of Alien Property moved to dismiss the claim filed by plaintiff Orvis Brothers & Co. Said motion was thereafter granted by a Hearing Examiner of the Office of Alien Property. On appeal from the order granting the motion the Director of the Office of Alien Property affirmed the decision of the Hearing Examiner.

On May 15, 1951, plaintiffs requested defendants to answer certain interrogatories pursuant to Rule 33 of the

Rules of Civil Procedure. The interrogatories were three in number, and read as follows:

1. Give the names of the estates of enemy aliens from the assets of which the Alien Property Custodian has caused or permitted payment to be made to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment; the names of the parties to whom such payments were made; the amount or amounts so paid; and the circumstances under which each payment was made and the time or times when the same were made.

2. State whether any payment has been made to an unlicensed attachment creditor in the United States out of assets which were in any way or to any extent subject to claims of creditors of Sanko Kabusiki Kaisya; give the name or names of the estates out of which such payments were made and the name or names of the parties to whom such payments were made; and state fully the circum-
[fol. 41] stances under which each such payment was made and the time when the same was made.

3. State whether any payment has been made to any creditor in the United States out of assets which were in any way or to any extent subject to claims of creditors of Sanko Kabusiki Kaisya; give the name or names of the estates out of which such payments were made and the name or names of the parties to whom such payments were made; and state fully the circumstances under which each such payment was made and the time when the same was made.

On May 25, 1951, defendants made a motion returnable on June 15 to strike the interrogatories and a further motion for judgment on the pleadings.

Plaintiffs requested defendant's counsel to adjourn the motion for judgment on the pleadings, so that the motion to strike the interrogatories could be disposed of first. The office of the United States Attorney refused to permit a prior disposition of the motion to strike the interrogatories and would only agree to an adjournment of both motions, or to a prior disposition of the motion for judgment on the pleadings.

Upon the argument of this motion, plaintiffs will make application to the Court for a prior disposition of the motion to strike the interrogatories, as the information sought in the interrogatories may serve to furnish an additional basis for awarding summary judgment to plaintiffs. The supplemental complaint alleges in Paragraph 25 that the Office of Alien Property has caused payments to be made to attachment creditors from assets of alien enemies, without the necessity of a license by the Treasury [fol. 42] Department prior to attachment. By reason of the refusal to make a payment in this case plaintiffs have been deprived of the equal protection of the laws. Plaintiffs seek by their interrogatories to obtain further details of such payments in order to establish more fully their right to relief based upon constitutional grounds.

It would therefore appear that plaintiffs' right to obtain answers to the interrogatories should be determined first. Neither defendant's motion for judgment on the pleadings, nor plaintiffs' cross-motion for summary judgment should be decided until after plaintiffs' right to obtain the information sought in the interrogatories has been determined.

Plaintiffs claim the right to summary judgment by virtue of the attachment lien irrespective of the answers to be made to the interrogatories. Plaintiffs' right to summary judgment because of the priority to which plaintiffs are entitled under the attachment lien would not be effected by the answer to the interrogatories.

By reason of the facts hereinabove set forth, Orvis Brothers & Co. believe that, both under the law of New York and the Federal law, they are entitled to the status of preferred creditors as a matter of law.

F. Howard Smith.

(Sworn to by F. Howard Smith June 6, 1951.)

[fol. 43] In United States District Court

Exhibit A Annexed to Notice of Cross-Motion for Summary Judgment.

July 18, 1947

Your File: WHM:WJR:AFW:rf, F-39-11-A-1, F-39-11-C-1, F-39-11-C-6, V. C. No. 9282.

Office of Alien Property
Department of Justice
Washington 25, D. C.

Attention Mr. David L. Bazelon, Assistant Attorney General Director, Office of Alien Property

Dear Sirs:

Reference is made to your letter of July 10, 1947, regarding debt owed by us to Sanko Kabusiki Kaisya (formerly C. Itoh & Co. Ltd.).

In accordance with Vesting Order No. 9282, we are enclosing our check No. 31116 drawn on The Union National Bank, Houston, Texas, for $29,633.24, covering the balance due Sanko Kabusiki Kaisya, Account No. 39-21693.

[fol. 44] This payment covers—

Balance to their credit December 31, 1945, as reported on Form APC 56, Series A (filed February 19, 1946)	$ 5,100.59
Pre-war balance per our Shanghai Branch books, transferred to head office in January 1947	24,532.65
	$29,633.24

Yours very truly, /s/ W. E. Parry, Controller.

WEP:EB.

bbc-Mr. W. L. A.

[fol. 45] IN UNITED STATES DISTRICT COURT

EXHIBIT B ANNEXED TO NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

WARNER D. ORVIS, HERBERT R. JOHNSON, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT a partnership doing business as ORVIS BROTHER & Co., and JOHN J. McCLOSKEY, JR., as City Sheriff of the City of New York, Plaintiffs,

AGAINST

ANDERSON CLAYTON & Co., Defendant

It is hereby stipulated by and between the parties in this action that the amount of $5,100.59 in the judgment entered herein on October 23, 1946 was computed in that sum instead of in the sum of approximately $29,633.24 as a result of the following facts and circumstances:

1. Said amount was intended to represent the amount of the balance in an open and running account between this defendant and one Sanko Kabusiki Kaisya (a Japanese Corporation, hereinafter called "Sanko") which could have been struck in favor of said Sanko on June 28, 1943, at which time a warrant of attachment against so much of the property of Sanko as would satisfy a demand by plaintiff [fol. 46] Orvis Brothers & Co. against Sanko of $19,796.85 together with the costs and expenses was served by plaintiff Sheriff on this defendant in New York County.

2. Prior to December 7, 1941, defendant transacted business on said open and running account with Sanko through defendant's principal office at Houston, Texas, and certain of defendant's branch offices and agencies outside the United States and more particularly through defendant's agencies at Osaka, Japan and Shanghai, China.

3. As a regular practice defendant recorded the results of transactions in said account as the same were reported to its principal office at Houston, Texas, in a ledger record kept at said office.

4. In the normal course of defendant's business its foreign agency and more particularly its agencies at Osaka, Japan and Shanghai, China, regularly reported transactions had by them to defendant's principal office at Houston, Texas by means of periodical abstracts or reports which were entered in the aforesaid ledger account at defendant's principal office at Houston, Texas.

5. Due to the outbreak of war between Japan and the United States and the interruption of the ordinary course of mail occasioned thereby, regular abstracts of business transacted by defendant's agencies at Osaka, Japan and Shanghai, China for the period between September 30, 1941 and December 7, 1941 failed to reach defendant's principal office at Houston, Texas and said office was left without any knowledge of such transactions until January 1947.

[fol. 47] 6. At the time of the service of the aforesaid warrant of attachment on June 28, 1943, the balance between entries in favor of Sanko and entries against Sanko in said ledger record at defendant's principal office at Houston, Texas amounted to $5,975.07 in favor of Sanko subject to reduction by reason of an item against Sanko in the sum of $874.48, thus making a net balance of $5,100.59 in favor of Sanko, subject to such items as might be entered in said ledger record when, as and if information reached defendant concerning other transactions between its agencies at Osaka, Japan and Shanghai, China and said Sanko.

7. On this basis, plaintiffs moved for and obtained the judgment entered herein on October 28, 1945, copy of which is annexed to the affidavit of Floyd Y. Keeler, sworn to February 13, 1948, and marked Exhibit B.

8. In fact, although at that time, unknown to either plaintiffs or defendant's principal office, defendant's former Shanghai Agency had had transactions prior to December 7, 1941 with Sanko resulting in an item in favor of Sanko in the sum of $24,532.65.

9. This fact was not known to either the plaintiffs, or to the defendant's principal office in Houston, Texas prior to the month of January, 1947.

10. In January 1947, defendant's principal office in Houston, Texas received the abstracts by mail from its Shanghai, China Agency and included in said abstracts was a net bal-

ance in favor of Sanko in the sum of $24,532.65 on account of transactions between Sanko and defendant's agency at Shanghai, China.

[fol. 48] 11. Said item if it had been known and entered in the aforesaid ledger account at defendant's principal office in Houston, Texas would have increased the balance. In the aforesaid open and running account which could have been struck in favor of Sanko at the time of the service of the aforesaid warrant of attachment on June 28, 1943 from $5,100.59 to $29,633.24.

Dated: New York, N. Y., February 17, 1948.

/s/ Baer and Marks, Attorneys for Plaintiffs,
/s/ Davis Polk Wardwell Sunderland & Kiendl,
Attorneys for Defendant.

[fol. 49] In United States District Court

Letter to Hon. Sidney Sugarman Dated July 26, 1951

(Letterhead of Baer, Marks, Friedman, Berliner & Klein, New York 6, N. Y.)

July 26, 1951

Hon. Sidney Sugarman, U. S. District Court House, Foley Square, New York, N. Y.

Re: Warner D. Orvis, et al. v. Howard McGrath, as Successor to the Alien Property Custodian, et al. Civil Action 50-68.

My dear Judge Sugarman:

We have submitted a proposed order and judgment in the above entitled matter in conformity with Your Honor's decisions of the motions in the above entitled action. The United States Attorney has submitted a proposed counter order and judgment which differs from our form of order and judgment in that it omits the phrase "together with interest thereon from said date, the Sheriff's poundage fees," from the third paragraph from the end of the order.

We know of no basis for the omission of interest and

Sheriff's poundage fees from the proposed judgment and we write this letter to urge that Your Honor sign the proposed order and judgment in the form submitted by us.

The judgment which plaintiff, Orvis Brothers & Co. obtained against the Japanese debtor was entered by the [fol. 50] County Clerk of New York County on December 3, 1943, in the sum of $20,714.84. There can be no question but that this judgment carries interest under the laws of New York State.

The judgment obtained by plaintiffs in the action in aid of attachment was entered by the County Clerk of New York County on October 28, 1946. It provides that the Sheriff shall apply the sum of $29,633.24 upon receipt by the Sheriff, to the satisfaction of the judgment for $20,714.84 and interest, Sheriff's fees and costs, and shall pay over any balance remaining in his hands to the Japanese debtor.

In The People of the State of New York (2d Russian Insurance Co.) 255 N. Y. 412, there is some discussion of the applicable rules with respect to the interest reached by a levy made under a warrant of attachment. Mr. Justice Cardozo stated:

> "The respondent takes the position that in the distribution of the surplus, interest is always limited to a period beginning with the date of the warrant of attachment, and can never include interest previously accruing. The appellant insists in opposition that the interest payable by the liquidator must include whatever interest is protected by the lien.
> Unquestionably the latter must be accepted as the proper rule."

[fol. 51] In view of the foregoing facts and authority we respectfully urge that Your Honor sign the order and judgment in the form submitted by plaintiffs.

Very truly yours, Baer, Marks, Friedman, Berliner & Klein, Arthur M. Bullowa.

AMB-mk

cc: Irving Saypol, United States Attorney, U. S. District Court House, Foley Square, New York.

[fol. 52] IN UNITED STATES DISTRICT COURT

LETTER TO BAER AND MARKS DATED JULY 30, 1951

(Letterhead of United States District Court,
Foley Square, New York.)

July 30th, 1951

Re: Orvis v. McGrath

Baer and Marks, Esqs.
20 Exchange Place
New York, New York

Att: Mr. Arthur Bullowa

Gentlemen:

Pursuant to telephone conversation had this morning with Mr. Bullowa, I forward herewith photostatic copy of letter from the Department of Justice addressed to Irving H. Saypol dated July 24, 1951 concerning the allowance of interest and Sheriff's fees in the judgment in the above case.

At the request of the United States Attorney, I have deleted from the copy certain paragraphs of a confidential nature which do not pertain in any way to the points of law involved.

Will you return the photostat with any reply you may wish to make.

Yours truly, /s/ Edward J. Ryan.

EJR/j

encl.

[fol. 53] EXTRACT FROM LETTER FROM DEPARTMENT OF JUSTICE DATED JULY 24, 1951

As discussed with Mr. Skolnik, there are two features of this order which we desire stricken. They are the two provisions in the last paragraph starting on page 2 of plaintiff's proposed order to the effect that the judgment filed in the office of the County Clerk of New York on December 3, 1943, in favor of the plaintiffs and against Sanko Kabusiki

Kaisya, which read ". . . together with interest thereon from said date, the Sheriff's poundage fees, . . ." shall be paid by the defendants. Citation of authorities in support of our objections will be set forth hereinafter.

We have, therefore, prepared and are enclosing the original and two copies of a counter-order and judgment identical in form with that submitted by the plaintiffs with the exception that we have omitted the language to which we object, namely, ". . . together with interest thereon from said date, the Sheriff's poundage fees, . . . "

As you know, under New York law where a judgment debtor is prevented through no fault of his own from paying a judgment, interest on the judgment will not be allowed. *Moscow Fire Insurance Co., etc., et al.* v. *Hecksler & Gottlieb, et al.*, 260 App. Div. 646, 23 N. Y. S. 2d 424, aff'd 285 N. Y. 674. Sanko Kabusiki Kaisya was a Japanese national and was prohibited by the provisions of Executive Order No. 8832 and General Ruling No. 12 of the Treasury Department from paying this judgment without Federal license—which has never been obtained. This Executive Order and General Ruling No. 12 are discussed at length on pages 15-18 of our memorandum in support of our motion for judgment on the pleadings.

We object to the inclusion of the "Sheriff's poundage fees" on the authority of *McCloskey, Sheriff* v. *McGrath*, [fol. 54] *Attorney General, etc.*, 341 U. S. 475. There the Court discussed the Sheriff's claims for his poundage fees in the companion cases of *Zittman* v. *McGrath, Attorney General, etc.*, 341 U. S. 446, and *Zittman* v. *McGrath, Attorney General, etc.*, 341 U. S. 471. The Sheriff had prayed that if the petitioner (the Attorney General) was entitled to possession of the property attached by the Sheriff, any decree to be entered should provide for payment of the Sheriff's statutory poundage fees arising from said attachment. The Court stated (p. 476):

> The precise status of the sheriff's claims under New York law, if they have been settled, is not made clear to us by the record, and, under the circumstances of this case, we cannot presume to say, nor could the District Court, what the New York courts would allow to the sheriff. Nor can we ascertain from the records

> the extent to which his fees have been or may be included in the judgments dealt with in the preceding cases. The record does not disclose that they have been allowed or fixed by the judge who issued the attachment warrants . . . .

This same observation may be made with respect to the Sheriff's poundage fees in the instant case. There is nothing in this record to disclose what poundage fees, if any, have been allowed to the Sheriff by the Supreme Court, New York County, which has exclusive jurisdiction in the matter.

The Supreme Court decided the two *Zittman* cases differently on the basis of the type of vesting order issued by the Attorney General. In the first case reported (341 U. S. [fol. 55] 446), where a right, title and interest vesting order was executed, it held that the Attorney General was not entitled to possession of the attached funds. In the second case reported (341 U. S. 471), where a *res* vesting order was executed, the Court held the Attorney General was entitled to possession of the vested funds and to administer them in accordance with the Trading with the Enemy Act. With respect to both cases, however, the Court decided that the matter of the Sheriff's poundage fees was for the New York state court to determine. It offered a solution to the Sheriff's problem in the following language (p. 478):

> This, however, is without prejudice to the right of the sheriff to have the New York courts determine the state law status of his fees, and, in the case of the attachments of the accounts held by the Chase Bank, to have them, as fixed, included in the judgments or otherwise given the same position as such judgments. And no prejudice is intended to his rights, in the case of the attachments of the accounts held by the Federal Reserve Bank, to present his fee claims, as settled by the New York courts, to the Custodian in the same manner and subject to the same procedures as the judgment creditors in Nos. 299 and 315.

We believe, therefore, that any provison in the instant order and judgment for the payment of "the Sheriff's

poundage fees" which have not been ascertained and fixed by the New York state courts is improper.

[fol. 56] IN UNITED STATES DISTRICT COURT

LETTER TO HON. SIDNEY SUGARMAN DATED AUGUST 2, 1951

(Letterhead of Baer, Marks, Friedman, Berliner & Klein, 20 Exchange Place, New York 5, N. Y.)

August 2, 1951

Hon. Sidney Sugarman, U. S. District Court House, Foley Square, New York, N. Y.

Re: Warner D. Orvis, et al. v. J. Howard McGrath, as Successor to the Alien Property Custodian, et al.

My dear Judge Sugarman:

Under date of July 26, 1951, we addressed a letter to Your Honor in support of our proposed order and judgment in the above entitled matter, and in opposition to the proposed counter order and judgment submitted by defendants which deleted from the third paragraph from the end of the order the phrase, "together with interest thereon from said date, the Sheriff's poundage fees."

Since writing said letter we have been furnished with a photostatic copy of a portion of a letter from the Department of Justice to Irving Saypol, Esq. dated July 24, 1951, in connection with this matter, to which we now wish to reply. We understand that portions of the letter have been excised because of their confidential nature. We do not understand how one party to a litigation can communicate matter to the Court which is confidential insofar as another party is concerned. We address our reply to those portions of the letter furnished to us.

Insofar as the deletion of the phrase "Sheriff's poundage fees" from the proposed order is concerned, we are re-[fol. 57] ferring this matter to Sidney Posner, Esq., Counsel to the Sheriff for consideration. May we point out, however, that the subsequent ordering paragraph (next to last paragraph of the proposed order and judgment) directs

that "payment shall be made by defendant to the Sheriff of the City of New York to be applied by him according to law." It would therefore appear that upon receipt of such funds the Sheriff will deduct his poundage fees, irrespective of whether or not there is direction in the prior paragraph that the same be paid.

The question is whether such payment of poundage shall reduce the recovery of Orvis Brothers & Co., or whether it is an additional sum to be paid by the defendants. The intent of the New York statutes with respect to attachment is that the Sheriff's poundage shall be an additional sum to be recovered from defendants and not a fee to be paid out of the recovery. Carmody in his work on New York Practice states that "Defendant is obliged to pay the Sheriff's fees before he is entitled to the return of the attached property on discharge of the attachment." Vol. VII, p. 653. The fees of the Sheriff are computed in accordance with Civil Practice Act, Section 1558. No judicial proceedings are ordinarily required. It would appear that the defendants should be directed to pay the Sheriff's poundage fees so that the recovery of the plaintiff will not be diminished thereby.

In *Murray Oil Products* v. *Mitsui*, 55 Fed. Supp. 353, aff'd 146 Fed. 381 the Alien Property Custodian paid the fees of the Sheriff. An order providing for such payment was entered on February 21, 1945 on consent of the Alien Property Custodian (Civil Action 18-459, S. D. N. Y.).

Nothing in the *Zittman* case supports defendants' contention that plaintiffs are not entitled to a declaration that [fol. 58] defendants shall pay the poundage due to the Sheriff. The decision in the *Zittman* case was specifically without prejudice to plaintiffs' right to have the fees of the Sheriff included in the judgment. In the *Zittman* case it was the defendants who were to pay said fees, if anyone was to pay them, and in no event could their liability be cast upon plaintiffs. The plaintiffs in the case at bar should not bear this burden.

With respect to the payment of interest, we wish to point out that the affidavit in support of the motion for summary judgment states at page 3 thereof:

> "At the date of the application for said warrant the indebtedness in the account of Takenosuke Itoh with

Orvis Brothers & Co., which indebtedness was guaranteed by C. Itoh & Co., and its successor, Sanko, was in the amount of $19,796.85, with interest from May 1, 1943."

No answering affidavit was filed by defendants, and it is therefore a fact in this case that the indebtedness for which the suit was brought includes interest.

The argument made by defendant, that the judgment debtor having been prevented, without fault of his own, from paying the judgment, requires the disallowance of interest, is a further example of the practice of the Alien Property Custodian of lifting himself by his bootstraps. Because the Alien Property Custodian prevented the judgment from being paid, he feels that he is now free to argue that he is not required to pay interest.

Nothing in the record indicates that the Japanese debtor could object, or did object, to paying interest, and we respectfully submit to Your Honor that the Alien Property [fol. 59] Custodian should not be allowed to stop the running of interest by his own acts. Nothing in *Moscow Fire Insurance Co.* v. *Heckscher & Gottlieb*, 260 App. Div. 646, 23 N. Y. S. (2d) 424, aff'd 285 N. Y. 674 sustains the claim that a liquidator or trustee should be permitted to raise defenses of his own making to the payment of interest. The case of *Moscow Fire Ins. Co. supra*, was distinguished on a similar ground in *Cable & Wireless* v. *Yokahoma Specie Bank* 191 Misc. 567, 79 N. Y. Supp. (2d) 597 in which Mr. Justice Walter stated:

"Counsel for the Superintendent urges that interest is not allowable because payment of plaintiff's claim has been and is prohibited by Executive Order No. 8389 of the President of the United States, 12 U. S. C. A. Sec. 95a note, Code of Fed. Reg., Cum. Supp., tit. 3, p. 645, and he seems to think that that was held in *McCloskey* v. *Brown*, affirmed 271 App. Div. 772, 64 N. Y. S. 2d 925, and *Moscow Fire Ins. Co. of Moscow, Russia* v. *Heckscher & Gottlieb*, 260 App. Div. 646, 23 N. Y. S. 2d 424, affirmed 285 N. Y. 674, 34 N. E. 2d 377, *supra*. There is no opinion or other state-

ment in *McCloskey* v. *Brown, supra,* which enables me to appraise the holding there made, but I think *Moscow Fire Ins. Co. of Moscow, Russia* v. *Heckscher & Gottlieb, supra,* is far from sustaining the Superintendent's position. In that case, payment under a judgment was prevented by an injunction obtained by the United States upon a claim that it was the owner of the fund, payment of which was directed by the judgment, and interest during the time that the injunction was in force was limited to the interest actually earned by the fund during that time. In that case, [fol. 60] therefore, payment was in fact prevented by an injunction obtained by a third person claiming in hostility to both the creditor and the debtor. Here, however, even upon the Superintendent's view that the terms of the Executive Order are such as to include payment of plaintiff's claim among the transactions thereby prohibited in the absence of a license, and even disregarding plaintiff's contention that the licenses issued to the Superintendent on January 14, 1942, and October 29, 1942, constituted such licenses as the Executive Order required, the fact remains that here it was not the Executive Order requirement of a license which did in fact prevent earlier payment of plaintiff's claim. Such payment was not made, not because of the existence of the Executive Order or because of the absence of a license, but because the Superintendent regarded plaintiff's claim as not entitled to payment. Delay in payment here has been caused, not by judicial or executive compulsion, but by the Superintendent's own act, and an act which I hold was wrongful; and I cannot see in that act any reason for refusing plaintiff's claim for interest."

The affidavit in support of the motion establishes that the indebtedness upon which the suit is based arose before the war and was acknowledged by the Japanese debtor on January 10, 1940 (affidavit of F. Howard Smith, p. 2-3). In view of the fact that the indebtedness antedates the war, the decision of Mr. Justice Holmes in *Hicks* v. *Guiness,*

269 U. S. 71 establishes that interest is properly payable. Mr. Justice Holmes stated in the course of that case:

> "The denial of interest for the time covered by the war seems to us wrong. The cause of action had ac- [fol. 61] crued before the war began, *Young* v. *Godbe*, 15 Wall. 562, 21 L. Ed. 250, and after it had accrued the question was no longer one of excuse for not performing a contract, but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course while the damages remain unpaid interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interests have led to a diversity of decisions but here again what we regard as principle has prevailed in later days, *Miller* v. *Robertson*, 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265; *Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft fur Cartonnagen-Industrie*, (1918) A. C. 239, 245; s. c. (1917) 1 K. B. 842, 850."

Accordingly, we request that our proposed order and judgment be signed in the form submitted.

Very truly yours, Baer, Marks, Friedman, Berliner & Klein, Arthur M. Bullowa.

AMB-mk

cc: Irving H. Saypol, Esq., United States District Attorney, United States Court House, Foley Square, New York, N. Y.

[fol. 62] IN UNITED STATES DISTRICT COURT

LETTER TO HON. SIDNEY SUGARMAN DATED AUGUST 6, 1951

August 6, 1951

Hon. Sidney Sugarman, U. S. District Court House, Foley Square, New York, N. Y.

Re: Warner D. Orvis, et al. v. J. Howard McGrath, as Successor to the Alien Property Custodian, et al.

Dear Judge Sugarman:

Mr. Arthur Bullowa, of Baer, Marks, Friedman, Berliner & Klein, Esqs., attorneys for the plaintiffs, has forwarded to me a copy of their letter of August 2nd addressed to Your Honor concerning the respective proposed orders and judgments submitted by both sides in the above entitled action. The letter states that they are referring to me for my consideration the question of the deletion of the phrase "Sheriff's poundage fees" from the proposed order.

I am in thorough agreement with the views expressed therein in opposition to the deletion of the above phrase. They correctly set forth the long and well-established practice of the Sheriff's Office in collecting poundage in such cases.

After property which has been attached comes into the hands of the Sheriff as a result of a voluntary turnover or because of an action in aid of attachment as in the instant case, the attaching creditor upon obtaining judgment in the main action must issue to the Sheriff an execution against attached property, pursuant to New York Civil Practice [fol. 63] Act, Sections 645 and 969. The Sheriff then must satisfy the judgment out of the attached property.

And, Section 1559 specifically authorizes the Sheriff to collect his poundage fees by virtue of the execution in the same manner as the sum therein directed to be collected. It is therefore apparent that under New York law the Sheriff must collect from the defendant or the person holding defendant's property not only enough to satisfy the plaintiff's judgment but enough to pay the Sheriff's poundage fee, otherwise the plaintiff's judgment cannot be satisfied in whole.

The Sheriff is not required in each instance to go to Court to have his poundage fee fixed and determined. Where there is no dispute that a levy has been made and the amount of the levy or collection is definitely ascertainable, there is no need for judicial determination. It is a relatively simple operation to make the arithmetical computation in accordance with the percentages provided in subd. 7 of Section 1558, namely, 5% on the first $1,000 collected, 2½% on the next $9,000 collected, and 1% on all sums over and above $10,000.

Where the sum of the judgment and interest thereon exceeds the amount of the available attachment proceeds, as it may here, the plaintiff actually bears the expense of the poundage fee. However, where such sum is less than the available attachment proceeds, it is very important to the plaintiff that provision be made for the payment of the poundage fee out of the attachment proceeds over and above the amount due to the plaintiff if he is to be paid in full.

The *McCloskey* and *Zittman* cases (341 U. S. 475, 341 U. S. 446, and 341 U. S. 471), cited in the Department of [fol. 64] Justice letter, in my opinion, are not authority for the exclusion of the "Sheriff's poundage fee" in the instant case. Those cases, unlike the case at bar, did not involve an action in aid of attachment brought jointly by the attachment creditor and the Sheriff. The issues as presented in those cases did not squarely raise the question of the manner in which the Sheriff's fees should be fixed or collected. The Supreme Court in the *McCloskey* case did not deny the Sheriff's claim for poundage on the merits, but, on the contrary, the Court recognized the Sheriff's right to fees and his right to equal treatment with the attachment and judgment creditors, in these clearly unmistakable words:

> "We have no doubt that, in one form or another, the proper fees of the Sheriff should be treated by federal law in the same manner as the attachments and judgments to which they appertain."

The Sheriff's poundage fee was not included in the State Court judgment obtained by plaintiff Orvis herein. In prac-

tice, such fee is never included in the judgment as part of the plaintiff's costs. The Civil Practice Act makes no provision for including poundage as part of the costs and thus as a part of the judgment, undoubtedly because such fees are prospective, problematical, and not readily ascertainable at the time of the entry of judgment. Moreover, as previously pointed out, other provision has been made in Section 1559 for the collection of poundage.

It will be noted that Civil Practice Act, Section 1518, which lists the disbursements which may be included in a bill of costs, does not provide for Sheriff's poundage, but does provide in subd. 8 for "The sheriff's fees for receiving [fol. 65] and returning one execution thereon, including the search for property." This is the small fee which is prescribed in Section 1558, subd. 6 and which the plaintiff is required to pay at the time of the delivery of the execution to the Sheriff.

If no provision is made for poundage in the proposed order and judgment herein, I know of no other way in which plaintiffs Orvis and Sheriff McCloskey can collect from the Custodian sufficient monies out of the attached proceeds to pay the poundage fee. It has been held that the Custodian is immune from suit in the State Courts and that such actions must be brought in the Federal courts (*New York Savings Bank* v. *Markham*, 186 Misc. 595, and cases cited therein).

Very respectfully yours, (sgd) Sidney Posner, Counsel.

pa

cc: Hon. Irving H. Saypol, United States District Attorney, United States Court House, Foley Square, New York, N. Y.

Baer, Marks, Friedman, Berliner & Klein, Esqs., Attorneys for plaintiffs, 20 Exchange Place, New York 5, N. Y.

[fol. 66] IN UNITED STATES DISTRICT COURT

MEMORANDUM ENDORSED BY HON. SIDNEY SUGARMAN, DISTRICT JUDGE, ON PROPOSED ORDER AND JUDGMENT

August 10, 1951

Although interest is allowable under in re People by Beha etc. 253 New York 365, I decline to sign this judgment until proof of compliance with 50 U. S. C. App. §20 is furnished.

Sidney Sugarman, U. S. D. J.

IN UNITED STATES DISTRICT COURT

DECISION ENDORSED BY HON. SIDNEY SUGARMAN ON DEFENDANTS' NOTICE OF MOTION FOR JUDGMENT ON PLEADINGS

"July 10, 1951

Motion Denied.

See *Zittman* v. *McGrath*, 341 U. S. 446.

Sidney Sugarman, U. S. D. J."

IN UNITED STATES DISTRICT COURT

DECISION ENDORSED BY HON. SIDNEY SUGARMAN ON PLAINTIFFS' NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

"July 10, 1951

Motion Granted.

See *Zittman* v. *McGrath*, 341 U. S. 446.

Sidney Sugarman, U. S. D. J."

[fol. 67] IN UNITED STATES DISTRICT COURT

ORDER AND JUDGMENT APPEALED FROM—Oct. 31, 1951

Civil Action # 50-68

Defendants having moved this court by notice of motion returnable on June 15, 1951, for an order directing the

entry of judgment on the pleadings on the ground that there are no issues as to any material fact and that defendants are entitled to judgment as a matter of law, and plaintiffs having made a cross-motion for summary judgment for the relief requested in the supplemental complaint pursuant to Rule 56 of the Rules of Civil Procedure and said motions having regularly come on to be heard,

Now, on reading and filing defendant's notice of motion returnable on June 15, 1951, plaintiffs' notice of cross motion dated June 4, 1951, the affidavit of F. Howard Smith, sworn to June 6, 1951, the supplemental complaint, and the answer, and after hearing Irving H. Saypol, U. S. Attorney (Leon Yudkin, Esq. of Counsel) in support of defendant's motion for judgment on the pleadings and in opposition to plaintiffs' motion for summary judgment and Baer, Marks, Friedman, Berliner & Klein, (Arthur M. Bullowa, Esq. of counsel) in opposition to defendants' motion for judgment on the pleadings and in support of plaintiffs' motion for summary judment, and due deliberation having been had, and the memorandum decisions of the court having been endorsed upon the respective motion papers, [fol. 68] Now, on motion of Baer, Marks, Friedman, Berliner & Klein attorneys for plaintiffs, it is

Ordered that defendants' motion for judgment on the pleadings be and the same is hereby denied, and it is further

Ordered that plaintiffs' motion for summary judgment be and the same is hereby granted, and it is further

Ordered, adjudged and decreed that plaintiffs on June 28, 1943 by virtue of a levy made under a warrant of attachment, acquired a lien upon the entire indebtedness of Anderson, Clayton & Co. to Sanko Kabusiki Kaisya prior and superior to that of the Alien Property Custodian and his successors in interest, and it is further

Ordered, adjudged and decreed that the Alien Property Custodian and his successors hold the sum of $29,633.24 described in Vesting Orders 9282 and 10253 subject and subordinate to the interest acquired by plaintiffs by virtue of said attachment lien, and it is further

Ordered, adjudged and decreed that Vesting Orders 9282 and 10253 are valid and effective only to the extent of any

surplus of the property so vested, after application thereof to the extent of plaintiffs' lien thereon in satisfaction thereof, and it is further

Ordered, adjudged and decreed that said attachment lien entitles plaintiffs to receive payment of the moneys received by defendants pursuant to Vesting Orders 9282 and 10253 to the extent necessary to satisfy said lien, and it is further

[fol. 69] Ordered, adjudged and decreed that the judgment entered in the office of the Clerk of the County of New York on December 3, 1943, in favor of Orvis Brothers & Co. and against Sanko Kabusiki Kaisya in the sum of $20,714.84 together with interest thereon from said date, the Sheriff's poundage fees, and costs of $35.50 shall be paid by defendants out of the sum of $29,633.24 received by defendants pursuant to Vesting Orders 9282 and 10253, and it is further

Ordered, adjudged and decreed that such payment shall be made by defendants to the Sheriff of the City of New York to be applied by him according to law, and it is further

Ordered, adjudged and decreed that such payment shall be made by defendants without prejudice to plaintiff's rights with respect to the balance, if any, of plaintiffs' claim remaining unsatisfied.

Dated: October 31, 1951.

Sidney Sugarman, U. S. D. J.

Judgment entered: William V. Connell, Clerk, Nov. 1, 1951.

[fol. 70] In United States District Court

Notice of Appeal—Filed December 17, 1951

Sirs:

Notice is hereby given that J. Howard McGrath, Attorney General of the United States, as Successor to the Alien Property Custodian, defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the order and judgment of the United States District Court for the Southern District of New

York, dated October 31, 1951, and entered herein on November 1, 1951, which denied the defendants' motion for judgment on the pleadings and which granted the plaintiffs' motion for summary judgment, and from each and every part thereof.

Yours, etc., Myles J. Lane, United States Attorney for the Southern District of New York, Attorney for the Defendants, Office & P. O. Address: United States Court House, Foley Square, New York 7, New York.

[fols. 71-74] Stipulation Designating Contents of Record on Appeal (omitted in printing)

[fol. 75] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 76] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 256

Argued June 4, 1952 Decided June 30, 1952

Docket No. 22340

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, Harold A. Rousselot, Henry H. Balfour, J. Antonio Zalduono, William G. Wigton, Clifford J. Doerle, and Herbert R. Johnson, doing business under the firm name and style of Orvis Brothers & Co., and John J. McCloskey, Jr., as City Sheriff of the City of New York, Plaintiff-Appellees,

v.

J. HOWARD MCGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, Defendant-Appellant

Before: Augustus N. Hand, Clark and Frank, Circuit Judges

Appeal from a judgment of the United States District Court for the Southern District of New York. Reversed.

[fol. 77] Baer, Marks, Friedman, Berliner & Klein (Donald Marks and Arthur M. Bullowa, of counsel) for appellees.

Harold L. Baynton, Assistant Attorney General, Myles J. Lane, United States Attorney for the Southern District of New York, and James D. Hill, George B. Searls and Westley W. Silvian, of counsel, for appellant.

Joseph M. Cohen, for Leo Zittman, Amicus Curiae.

Debts owing to Japanese Nationals were blocked by Executive Order No. 8389, effective as to Japan on June 14, 1941 (6 F. R. 3715), promulgated pursuant to the Trading With the Enemy Act, 50 U. S. C. App. § 5 (b). General Ruling No. 12, issued April 21, 1942 by the Treasury, stated that any unlicensed transfer of property in a blocked account was null and void, and defined "transfer" to include

an attachment. Paragraph 4 of that Ruling said that, although an attachment might be valid between the debtor and the attaching creditor, it could not confer a greater interest in the property "than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

In 1943, plaintiffs obtained a lien, by levy under an attachment warrant issued in a suit plaintiffs brought in a New York State court, on the account owing by Anderson, Clayton & Company, an American corporation, to plaintiffs' debtor, a Japanese National. In Plaintiffs' attachment suit, judgment was entered in favor of plaintiffs in October 1946, with an amendment, in February 1948, increasing the amount recoverable because of the discovery of an additional indebtedness. Plaintiffs' application to the Attorney [fol. 78] General for a license to permit payment to them by Anderson, Clayton & Company, was denied in February 1947 and again in February 1949. On June 27, 1947, and on successive dates in 1947-1948, the Attorney General, by res vesting orders, took over the debts owed the Japanese National by Anderson, Clayton & Company. The plaintiffs filed notice of claim under § 9(a) of the Trading With the Enemy Act. The claim was dismissed by the hearing examiner as not within that section's application. Plaintiffs brought the present suit under § 9(a) of the Trading With the Enemy Act. After filing answer, the defendant moved for judgment on the pleading, and plaintiffs cross-moved for summary judgment in their favor. The district court denied defendant's motion and granted plaintiffs' motion for summary judgment.

FRANK, Circuit Judge:

1. The Custodian argues that the court below had no jurisdiction of this suit because of § 34(f) which provides for judicial review in the District of Columbia exclusively. But § 34(i) says that no person asserting "any interest, right, or title" in property acquired by the Custodian shall be barred from proceeding for its returns pursuant to the Act by reason of any proceeding he may have brought pursuant to § 34. Accordingly, if the plaintiff had an "interest, right or title," he could properly maintain his suit in the court below, pursuant to § 9(a). The question, then, is whether the attachment created has such an "interest, right

or title," *i.e.*, a lien conferring priority over other creditors, although the Custodian took control under a res vesting order.

2. The trial judge apparently thought the answer self-evident. He said merely: "Motion denied. See Zittman v. [fol. 79] McGrath, 341 U. S. 446." We think, however, that a reading of that Supreme Court opinion (which we shall call Zittman No. 1) and of its companion, 341 U. S. 471 (which we shall call Zittman No. 2), discloses that this question the Supreme Court deliberately left undecided.[1]

3. Undoubtedly, Congress has the power to authorize the nullification of all attachment liens obtained after a freezing order (on the analogy of the effect of bankruptcy on preferences). We must enquire whether Congress gave such authority.

As noted in Zittman No. 2, § 34(a) provides that property "vested" in the Custodian "shall be *equitably applied* by the Custodian * * * to the payment" of the alien debtor's debts.[2] Section 34(d) says that payments shall be pro rata if the available money is "insufficient for the satisfaction of all claims allowed by the Custodian." Section 34(g) establishes an order of priority of claims, but accords no priority to attachment liens over ordinary claims. In Zittman No. 2, the Court stated that, under a res vesting order, the Custodian "takes over the estate for administration," as a "liquidation measure for the protection of American creditors."[3] The words "equitable," "administration" and "liquidation" reinforce the idea of equality and suggest repugnance to the notion that the race should be to the swift among the creditors. The absence of any provision according priority to attachment liens indicates [fol. 80] an intention to deprive them of any preferential

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[1] Zittman No. 1 held merely that an attachment here can be a valid lien as between (a) the attaching creditor and (b) either the enemy debtor or the Custodian if he chooses —by a "right, title and interest" order—to step into the debtor's shoes. Zittman No. 2 held that a res vesting order does not "work any automatic" destruction of an unlicensed attachment lien.

[2] 341 U. S. at 474. Emphasis added.

[3] 341 U. S. at 474-475.

position. Moreover, since in some states an attachment does not create a lien, the granting of such preferences will result in a lack of uniformity in an area which is peculiarly of national concern. Justices Reed and Burton apparently reached a conclusion adverse to the contention made by the plaintiffs in the instant case.[4]

On the other hand, Douglas, J., said he could "find nothing in the Act which warrants leveling the good faith lien claimant to the unsecured status of the others," adding (in a note): "The priority of debt claims in § 34(g), 60 Stat. 925, 928, does not purport to deal with creditors preferred by reason of a lien lawfully acquired in judicial proceedings."[5] However, that brings up this question: Does a lien procured in an "unlicensed" attachment suit give rise to a lien acquired "lawfully" as against the Custodian when he makes a res vesting order? The answer, we think, turns on the meaning and validity of Treasury Ruling No. 12, 7 F. R. 2291.

That Ruling purported to be issued pursuant to the freezing order, Executive Order No. 8389 (as amended). The Ruling, effective on April 21, 1942—and thus antedating the attachment suit here—provided that any unlicensed transfer of property in a blocked account after the effective date of the Executive Order was null and void, and defined "transfer" to include the issuance or levy of any attachment; paragraph 4 added that no attachment could confer a great interest in property "than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license," although it would be valid as between the parties for the purpose of [fol. 81] determining the rights or liabilities litigated. We think that, if valid, this Ruling deprives an unlicensed attachment lien of any preferential position in the event of a res vesting order. We think further that this Ruling was within the scope of the Executive Order, and that both that Order and the Ruling were authorized by § 5 (b) of the Act. Cf. *Clark* v. *Propper*, 169 F. (2d) 324, 327 (C. A. 2); *Propper* v. *Clark*, 337 U. S. 472.

Reversed.

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[4] See 341 U. S. at 465 *et seq.* They relied, in part, on *Propper* v. *Clark*, 337 U. S. 472.

[5] 341 U. S. at 464, 465.

[fol. 82] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of June one thousand nine hundred and fifty-two.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

WARNER D. ORVIS, et al., Plaintiff-Appellees,

v.

J. HOWARD MCGRATH, etc., Defendant-Appellant

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 83] [Endorsed:] United States Court of Appeals for the Second Circuit. Warner D. Orvis, et al., v. J. Howard McGrath, etc. 256. Judgment. United States Court of Appeals, Second Circuit. Filed June 30, 1952. Alexander M. Bell, Clerk.

[fols. 81-86] Petition for Rehearing covering 6 pages filed July 14, 1952 omitted from this print. It was denied, and nothing more by Order July 29, 1952.

[fol. 90] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WARNER D. ORVIS, et al., Plaintiffs-Appellees,

against

J. HOWARD MCGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, Defendant-Appellant

Before: Augustus N. Hand, Clark and Frank, Circuit Judges

ON PETITION FOR REHEARING

Baer, Marks, Friedman, Berliner & Klein, Attorneys for Plaintiffs-Appellees.

Per Curiam: Petition denied.

Augustus N. Hand, Charles E. Clark, Jerome N. Frank, C. JJ.

Filed July 29, 1952.

[fol. 91] [Endorsed:] United States Court of Appeals, Second Circuit. Filed July 29, 1952. Alexander M. Bell, Clerk.

[fol. 92] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of July, one thousand nine hundred and fifty-two.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

WARNER D. ORVIS, et al., Plaintiffs-Appellees,

v.

J. HOWARD MCGRATH, Attorney General, etc., Defendant-Appellant

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellees,

Upon consideration thereof, it is ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk.

[fol. 93] [Endorsed:] United States Court of Appeals, Second Circuit. Warner D. Orvis, et al., v. J. Howard McGrath, etc. Order. United States Court of Appeals, Second Circuit. Filed July 29, 1952. Alexander M. Bell, Clerk.

[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 89] SUPREME COURT OF THE UNITED STATES

No. 404, October Term, 1952

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed December 15, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

No. 104

IN THE

Supreme Court of the United States

October Term, 1952

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, and HERBERT R. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

against

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DONALD MARKS,
Counsel for Petitioners.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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IN THE

Supreme Court of the United States

October Term, 1952

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, and HERBERT R. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

against

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 30, 1952.

Opinions Below

The decision of the District Court was endorsed on the papers without other opinion (R. 66). The opinion of the Court of Appeals (R. 76-79) is not reported.

Jurisdiction

The judgment of the Court of Appeals (R. 80) was entered on June 30, 1952. A petition for rehearing, filed on July 14, 1952 (R. 81), was denied on July 29, 1952 (R. 88). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

Does an attachment secured by United States nationals in accordance with the laws of the State of New York upon alien enemy assets subsequently vested by the Alien Property Custodian create an interest, right or title sufficient to support an action by the attachment creditor and the Sheriff of New York County under Section 9(a) of the Trading with the Enemy Act? Stated otherwise, the question is whether the Alien Property Custodian, in the distribution of assets in his possession, may deny recognition to such an attachment lien.

Statutes and Regulations Involved

The pertinent portions of the Trading with the Enemy Act (50 U. S. C. App., Sections 5(b), 9(a) and 34), Executive Order No. 8389 (5 F. R. 1400 as amended by Executive Order 8785, 6 F. R. 2897), and General Ruling No. 12, issued April 21, 1942 by the Treasury Department (7 F. R. 2291) are set forth in the appendix *infra* pages 18-30.

Statement

In 1943, petitioners obtained a lien, by levy under an attachment issued in a suit brought in the Supreme Court of the State of New York, on a debt owed to petitioners' debtor, a Japanese national (R. 19). In that suit, judgment was entered in favor of petitioners in

October, 1946, and amended in February, 1948, to increase the amount recoverable because of the discovery of an additional amount of indebtedness. The judgment as amended was in the sum of $29,633.24 (R. 23).

Petitioners applied to the Treasury for a license to permit payment to them by the debtor, but the application was denied first in February, 1947 and again in February, 1949 (R. 37; 40).

On June 27th, 1947, and again on November 25th, 1947, the Office of Alien Property by successive res vesting orders vested an aggregate of $30,507.72 which the attachment debtor owed to the Japanese national, and the moneys were paid to the Alien Property Custodian (R. 37, 38).

Petitioners filed notice of title claim under Section 9(a) of the Trading with the Enemy Act. That claim was dismissed by the Hearing Examiner who was sustained upon appeal by the Director of the Office of Alien Property (R. 39, 40).

Petitioners then brought the present suit under Section 9(a) of the Trading with the Enemy Act, seeking a judgment declaring that the lien of the attachment upon the chose in action entitled them to a preference in the distribution of the moneys paid to the Alien Property Custodian by the attachment debtor (R. 17-27).

After joinder of issue, respondent moved for judgment on the pleadings, and petitioners cross-moved for summary judgment. The District Court denied respondent's motion and granted petitioners' cross-motion on the authority of *Zittman* v. *McGrath*, 341 U. S. 446. The Court of Appeals reversed, stating that petitioners could maintain a Section 9(a) suit if they had an "interest, right or title" in property held by the Custodian: but concluding that Section 34 of the Trading with the Enemy Act contemplates "the idea of equality" in the distribution of assets held

by the Custodian; that Congress gave authority to the Treasury to nullify attachment liens obtained after the freezing order; that Treasury Ruling No. 12 was an exercise of that authority; and that an unlicensed attachment lien is, therefore, not entitled to preferential treatment in the distribution of assets by the Custodian.

Specifications of Errors to be Urged

The Court of Appeals erred:

1. In refusing to apply the underlying premise of the two *Zittman* decisions that an attachment lien upon blocked property is valid though secured without first having obtained a Treasury license.

2. In holding that Congress had the power to and did authorize the deprivation of a preferential position for "unlicensed" attachment liens, valid under State law and secured prior to a vesting order, in the distribution of the attached assets by the Alien Property Custodian.

3. In construing Section 34 of the Trading with the Enemy Act as indicating the intention of Congress to deprive "unlicensed" attachment liens of any preferential position in the distribution of assets by the Alien Property Custodian.

4. In holding that Treasury Ruling No. 12 prohibits the acquisition of a valid attachment lien in the absence of a Treasury license.

5. In sustaining the validity of the licensing power granted to the Custodian by Section 5(b) of the Trading with the Enemy Act, as implemented by General Ruling No. 12, in the absence of guiding criteria for the exercise of such power.

Reasons for Granting the Writ

1. (a) The question presented by this case, one of great importance in the administration of the Trading with the Enemy Act, was specifically left open by this Court in *Zittman* v. *McGrath,* 341 U. S. 446 and *Zittman* v. *McGrath,* 341 U. S. 471 (respectively referred to herein as Zittman No. 1 and Zittman No. 2). The answer furnished by the Court below is erroneous as a matter of statutory interpretation. It is, moreover, in conflict with the premise underlying this Court's decisions in the *Zittman* cases. Because the Court below has erroneously interpreted the statute in an area of wide importance, and because its decision is irreconcilable with the rationale of the *Zittman* decisions; this case is a peculiarly appropriate occasion for the exercise of this Court's certiorari jurisdiction.

(b) In *Zittman No. 1,* this Court, reversing the Court of Appeals for the Second Circuit, held that attachment levies were not "transfers" forbidden by Executive Order 8389, and that the Custodian was not entitled to a declaratory judgment that the attachment creditor "obtained no lien or other interest" in the attached property.

In *Zittman No. 2,* this Court held that as between an attachment creditor and the Custodian, under a res vesting order, the Custodian was entitled to possession of the property upon which the levy of attachment had been made and that "the consequences, if any, that flow from the substitution of the Custodian in place of the Bank as holder of the funds, upon rights derived from valid state court judgments secured by attachment are not ripe for determination" (341 U. S. at 474).

Those issues are now presented for determination. We are informed that the Custodian and the parties to the *Zittman* cases are awaiting the outcome of this litigation to ascertain their respective rights and obligations. The

Sheriff of the County of New York, one of the petitioners here, has many attachments in his office, the validity of which is in question. The orderly and prompt distribution of assets vested by the Custodian requires a final settlement by this Court of the question at issue.

2. While the point presented in this case was left open by this Court in the *Zittman* decisions, the ruling below is in irreconcilable conflict with the premise upon which they rest.

In *Zittman No. 1,* where the Custodian had issued merely a "right, title and interest" vesting order, this Court said that such orders merely put him in the shoes of the judgment debtors and since as against such debtors "the attachments and the judgments they secure are valid under New York law, and cannot be cancelled or annulled under a Vesting Order by which the Custodian takes over only the right, title and interest of those debtors in the accounts", the attachment creditor was entitled to possession of the res (341 U. S. 446 at 464).

Mr. Justice Jackson, in his opinion for the Court, went on to say: "But, of course, as against the Custodian, exercising the paramount power of the United States, they do not control or limit the federal policy of dealing with alien property and do not prevent a *res* vesting, as sustained in the companion cases, if the Custodian sees fit to take over the entire fund for administration under the Act. In such case, all federal questions as to recognition by the Custodian of the state law lien, or priority of payment, are reserved for decision if and when presented in accordance with the Act" (341 U. S. 446, at 464).

In *Zittman No. 2,* this Court said that where the Custodian has issued a res vesting order "the transfer of possession of these funds does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration" (341 U. S. 471,

at 474). Again this Court spoke of rights derived from "valid state court judgments secured by attachment" (341 U. S. 471, at 474).

The decision below, however, is premised upon the view that no valid attachment lien could be secured in the absence of a Treasury license. The Court of Appeals put the question as follows: "Does a lien procured in an 'unlicensed' attachment suit give rise to a lien acquired 'lawfully' as against the Custodian when he makes a res vesting order?" This question was answered in the negative on the ground that Treasury Ruling No. 12 "provided that any unlicensed transfer of property in a blocked account after the effective date of the Executive Order was null and void" and that an attachment was within the scope of the term "transfer" (R. 79).

If, as this Court has said, an attachment in accordance with state court process is "valid", it creates a lien. The settled legal effect of a lien is to give the lienor an interest in the property superior to claims of general creditors.[1] The decision below has deprived petitioners of such rights.

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[1] Chief Justice Cardozo noted the nature of the property interest created by an attachment lien in *Matter of People (First Russian Ins. Co.)* 253 N. Y. 365:

> "The claimant, the attaching creditor, is not asserting a claim to participate in the fund as a beneficiary of a trust, a member of the class or group for whom administration was assumed. The claim which it asserts is not in subordination to the trust, but in priority and even, in a sense, in hostility thereto. The lien of its attachment has put it in the same position as if it were the holder of a mortgage or of an equitable lien, the product of agreement. A receiver or other officer taking such a fund into his custody, must take it as he finds it, with all its imperfections on its head. One of those imperfections for this receivership was a lien created as security, not for principal alone, but for principal and interest. The fund is not free until the lien has been discharged" (p. 368).

In this setting it is misleading to draw a distinction, as the court below did, between the effect of the attachment lien as between the attachment creditor and the Custodian, on the one hand, and the attachment creditor and debtor, on the other hand. In denying recognition to petitioners' attachment lien, the Custodian has not subordinated petitioners' claim to that of the Government. He has destroyed petitioners' preferential position as against general creditors.

Thus, the decision of the Court of Appeals has, in effect, denied the validity of petitioners' attachment lien. It is wholly inaccurate to say that this is merely denial of recognition as between petitioners and the Custodian. As a matter of substance, it is a destruction of property rights for the benefit of creditors who otherwise would be subordinate to petitioners' claim.

In the truest sense, the decision below, therefore, conflicts with the ruling of this Court in the *Zittman* cases that such attachment liens are valid.

See also: *Lyon* v. *Singer*, 339 U. S. 841.

3. The decision below erroneously construes and applies Section 34 of the Trading with the Enemy Act. The Court of Appeals concluded that the provision of Section 34(a) that the property vested in the Custodian "shall be equitably applied by the Custodian * * * to the payment" of the alien debtor's debts indicates an intention of Congress that attachment liens shall be deprived of a preferential position. The Court said: "The words 'equitable', 'administration' and 'liquidation' reinforce the idea of equality and suggest repugnance to the notion that the race should be to the swift among the creditors" (R. 78).

It should be observed that the Court of Appeals also rested upon the fact that Justices Reed and Burton "apparently reached a conclusion adverse to the contention

made by the plaintiffs in the instant case". The reference is to the dissenting opinion of Mr. Justice Reed in *Zittman No. 1.*

Against this should be noted the concurring opinion of Mr. Justice Douglas, in which he said: "But the policy of the Act is in no way subverted by recognition of a lien which can ripen into a priority only if payment would have no such effect. Denial of the lien could be made only if the Act called for an equality of distribution among claimants, regardless of their innocence or guilt. I can find nothing in the Act which warrants leveling the good faith lien claimant to the unsecured status of the others" (341 U. S. 442, at 465). In a footnote, Mr. Justice Douglas calls attention to the fact that "The priority of debt claims contained in Section 34(g), 60 Stat. 925, 928, does not purport to deal with creditors preferred by reason of a lien lawfully acquired in judicial proceedings" (341 U. S. 442, at 465).

Judge Frank, in his opinion below, supported the authority of Congress to nullify attachment liens obtained after the freezing order, on the analogy of the effect of bankruptcy on preferences. There is nothing in the Trading with the Enemy Act to justify the view that Congress intended to vest in the Custodian the extraordinary powers of a bankruptcy court. Indeed, it is questionable that Congress could constitutionally do so.

> *Ochoa* v. *Hernandez y Morales,* 230 U. S. 139;
> *Lynch* v. *United States,* 292 U. S. 571.

In *Security-First National Bank* v. *Rindge Land & Nav. Co.,* 85 Fed. (2d) 557, the Court of Appeals for the 9th Circuit said:

> "The right to retain a lien until the debt secured thereby is paid is a substantive property right which may not be taken from the creditor consistently with

the Fifth and Fourteenth Amendments to the Constitution" (85 Fed. (2d) at 561).

In *Chemical Foundation* v. *E. I. Du Pont*, 29 Fed. (2d) 597, the District Court for the District of Delaware said:

> "A chose in action is property. The Fifth Amendment to the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, denies to the Congress power to transfer property from one to another, directly or indirectly" (29 Fed. (2nd) at 602).

The decision of the Court below has violated these principles. The ultimate disposition of vested property among claimants thereto does not involve an exercise of the war powers of Congress (See *Chemical Foundation* v. *Du Pont*, *supra*). Congress may not itself destroy a lien acquired in accordance with State law to the advantage of general creditors of an alien debtor, and *a fortiori* may not delegate to the Custodian the judicial authority to do so.

In any event, the history of Section 34 of the Trading with the Enemy Act demonstrates that the Court of Appeals erroneously interpreted the statute.

Section 34 was embodied in a bill to amend the First War Powers Act of 1941, the purpose of which was explained in House Report No. 2398, 79th Congress, Second Session. Section 34 (which was numbered 35 in the bill) was intended "to provide machinery for paying claims of creditors against the former owners of vested properties on an equitable basis to the extent that the assets vested from each debtor permit" (at p. 1).

Section 35 of the bill (Sec. 34 of the Act) was at least in part the result of a decision of this Court in *Markham* v. *Cabell*, 326 U. S. 404, which held that an ordinary creditor of an enemy alien had the right to sue the Custodian

under Section 9(a) and to be paid on a "first come, first served" basis (House Report, No. 2398, 79th Cong. 2nd Sess. at pp. 9-10).

The Committee disclaimed any intention to change the status of a secured creditor or a creditor claiming a lien, saying:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection (i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors" (House Report No. 2398, 79th Cong., 2nd Sess. at p. 15).

Nothing in Section 34 or in its legislative background justifies the conclusion that the principle of "equitable distribution" was intended to reduce lien creditors to the status of debt claimants. Mr. Justice Douglas took his position squarely on this construction of Section 34 in his concurring opinion in *Zittman No. 1* (see p. 8, *supra*).

The language of the section itself refutes the conclusion of the Court of Appeals. Section 34 (i) provides that "the sole relief and remedy available to any person seeking satisfaction of a debt claim * * *" shall be that provided in Section 34; but this is limited by the proviso "that no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Cus-

further maintained except in conformity with this section: *Provided,* That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * *

2. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, FRANKLIN D. ROOSEVELT, PRESIDENT

OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury, by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to, the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

todian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding."

This is a plain recognition that the remedies provided by section 9(a) of the Act remain unimpaired. An attachment creditor by virtue of his lien upon the property attached is one of the class of creditors whose rights under Section 9(a) are expressly preserved.

Judge Frank, in his opinion below, said: "The absence of any provision according priority to attachment liens indicates an intention to deprive them of any preferential position". We submit to the contrary, that the absence of any provision in Section 34 indicating an intention that attachment liens should be deprived of the status theretofore enjoyed under Section 9(a) demonstrates that Congress did not intend to reduce the attachment creditor to the status of an unsecured creditor. This Court said in *Markham* v. *Cabell*, 326 U. S. 404, at 411:

> "We can find no indication in the 1941 legislation that Congress by amending Section 5(b) desired to delete or wholly nullify Section 9(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

The intention of Congress to preserve the rights theretofore existing under Section 9(a) is affirmatively expressed in the following statement in Senate Report No. 1839, 79th Congress, Second Session, at Page 2:

> "The bill as thus amended preserves in full these rights under Section 9(a) which the friendly foreign

national, together with the United States citizen has had for more than 25 years under the act."

The decision below has engrafted a limitation upon Section 9(a) which is not justified by the wording of Section 34 or by the express policy of Congress which led to the enactment of that Section.

4. General Ruling No. 12 was incorrectly interpreted by the Court below.

The Court of Appeals' view of General Ruling No. 12 upon which its decision rests, is in irreconcilable conflict with the interpretation of that Ruling adopted by this Court in *Littman No. 1*. Mr. Justice Jackson gave careful consideration to the Ruling, pointing out that if the Government's construction of the Ruling were adopted, the result would be "inconsistent and irreconcilable with the contentions made one day after its issuance by both the Treasury and the Department of Justice to the New York Court of Appeals" (341 U. S. at 453).

The majority opinion quoted extensively from a brief *amicus curiae* dated April 22nd, 1942, filed by the Treasury and the Department of Justice in the New York Court of Appeals in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332. We should like particularly to note one sentence quoted from that brief: "So far as foreign funds control is concerned, there can be an attachable interest under New York law with respect to the blocked assets" (341 U. S. at 465).

After considering the shift in the Government's position following the decision of this Court in *Propper* v. *Clark*, 337 U. S. 472, this Court concluded as follows:

> "But, as the Government before that decision so unequivocally urged upon the New York Court of Appeals, attachment proceedings as pursued in these

cases have no such consequences. Nothing in these state court proceedings have purported to frustrate the purposes of the federal freezing program. On the contrary, the effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the German nationals. There is no suggestion that these attachment proceedings could in any manner benefit the enemy. The sole beneficiaries are American citizens whose liens are not derived from the enemy but are adverse to any enemy interests. And, if no federal freeze orders were in existence, these state proceedings would tie up enemy property and reduce the amounts available for enemy disposition. We agree with the Government's assurance to the Court of Appeals in the Polish Relief case that these proceedings, in view of the fact that they do not purport to control the Custodian in the exercise of the federal licensing power, or in the power to vest the *res* if he sees fit to do so for administration, are not inconsistent with the freezing program and we think they were not invalidated or considered in Propper v. Clark, supra" (341 U. S. at 462, 3).

The Court of Appeals apparently reasoned that, although General Ruling No. 12 provided that an unlicensed transfer of property in a blocked account was "null and void", the attachment in the case at bar could be valid as between the parties, but invalid as against the Custodian. General Ruling No. 12 is thus given a meaning which is neither justified by its language nor required by any considerations of policy in the administration of the Custodian's office.

This Court has held that General Ruling No. 12 properly construed does not require a Treasury license as a condition precedent to a valid attachment under State law.

The Treasury and the Department of Justice have said that considerations of administration do not impel the interpretation of General Ruling No. 12 which the Government urged in the *Zittman* cases. If the so-called "unlicensed" attachment is valid, then plaintiff, as a lien creditor, has statutory rights under Section 9(a) which cannot be brushed aside by a factitious distinction that the lien, though valid as between the parties, is invalid as against the Custodian.

This Court in *Lyon* v. *Singer*, 339 U. S. 841, and its companion cases confirmed the view that a preferential position may be secured under state law in spite of the absence of a license, and that the freezing order with its attendant restrictions did not prevent the creation of a claim entitled to a preference under state law.

This Court has left open the effect of the lien as between the attachment creditor and the Custodian. This is not to say that this Court has suggested that the lien might be disregarded or invalidated by a construction of General Ruling No. 12 such as Judge Frank adopted in his opinion.

We suggest that the only question properly open is whether the lien creditor may enforce payment by suit against the Custodian under Section 9(a) prior to final liquidation of the vested assets, or whether orderly administration may require that distribution to creditors of all classes be deferred until a final determination of all preferences and priorities.

In this case, however, no showing was made by the Custodian on the motions in the District Court that any considerations of administration required deferment of payment to petitioners. On the record, therefore, petitioners were entitled to judgment in accordance with the provisions of Section 9(a).

5. The Court of Appeals held that in the absence of a license, the attachment lien is invalid. This necessarily implies the constitutionality of Section 5(b) of the Trading with the Enemy Act and the validity of General Ruling No. 12 as an exercise of the power granted by the statute.

The Court of Appeals, however, did not consider this question of constitutionality, although the record discloses that while petitioners have twice been refused a license, the Custodian has granted retroactive licenses to other attachment creditors (see Supplemental Complaint, Par. 25—admitted by Answer, Par. 8—R. 24, 30). Petitioners' applications for license were denied without assignment of any reason therefor by the Custodian. This action was a purely arbitrary exercise of the Custodian's claimed power to grant or withhold a license in his unrestricted discretion. The interpretation of General Ruling No. 12 adopted by the Court of Appeals is not only inconsistent with this Court's construction of the Ruling in the *Zittman* cases but presents a question of the constitutionality of Section 5(b) of the Trading with the Enemy Act for consideration.

* * *

Nothing in the decisions of this Court can be cited in justification of the interpretation of the statute adopted below. If the decision below is permitted to stand the effect upon the administration of the Trading with the Enemy Act will be profound. The Custodian will necessarily assume the authority of a Referee in Bankruptcy in many cases. The residual force of Section 9(a) will be uncertain. In fact, the scheme of administration of enemy assets contemplated in the 1946 legislation as expressed in the House Report referred to above will be completely subverted. The principle of "equitable distribution" will have been converted into a weapon to destroy rights secured under state law and recognized as valid by this Court. Such a result is in essential conflict with the

Zittman decisions. And no compelling interest of the United States dictates the result reached below. This Court should, therefore, exercise its certiorari jurisdiction to set this matter right.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DONALD MARKS,
Counsel for Petitioners.

APPENDIX

1. Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. 1 et seq:

* * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person, as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or per-

son may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * * *

§ 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it

has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * *

SEC. 34 (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any

person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond

the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowanee, in whole or in part.

(d) Payment of debt claims shall be made only out of such money includ 1 in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with

subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's

determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the

schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * *

3. General Ruling No. 12, April 21, 1942, 7. F. R. 2991:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling, and involved in, or arising out of, any action

or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power: *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

* * *

IN THE

Supreme Court of the United States

October Term, 1952
No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, and HERBERT J. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

against

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

PETITIONERS' REPLY BRIEF

DONALD MARKS,
Counsel for Petitioners.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349

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PETITIONERS' REPLY BRIEF

Two of the points in Respondent's brief require attention.

In Point 3 (p. 14), Respondent attempts to minimize the importance of the case by reference to facts dehors the record. Petitioners are, of course, in no position to challenge these statements. But it may be noted that the statistics deal only with claims already filed in the Office of Alien Property and not with the claims that may be filed on unlicensed attachments in the future. The Sheriff of the County of New York has now in his office 25 post-freezing, unlicensed attachments upon blocked property, aggregating $15,672,979.23 in amount. No one can say

how many such attachments exist in the country as a whole, or the total money involved. It is obvious that the decision in this case may have a much broader impact than is indicated in the figures given by Respondent.

Even the thirteen claims and $328,500 in money disclosed by Respondent are not *de minimis*. The issue in this case has in any event sufficient importance to warrant the issuance of a writ.

2. In Point 2 of Respondent's brief (pp. 8-13), the argument is made that Executive Order No. 8389, as amplified by General Ruling No. 12, prohibited a valid attachment lien "as against the Government" unless licensed by the Treasury; and that this view is essential to the objectives of the freezing controls.

Both the premise and the conclusion are erroneous.

In the first *Zittman* case, this Court gave extended consideration to this very argument (341 U. S. at 452-459). The Court quoted at length from a brief filed by the Departments of Justice and Treasury with the New York Court of Appeals in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332 (1942) citing, among other things, the following statements which are quite irreconcilable with the position now taken by the Department of Justice:

> "'So far as foreign funds control is concerned there can be an attachable interest under New York law with respect to the blocked assets'" (341 U. S. at 455).
>
> • • •
>
> "'Under this analysis of what the nature of any attachment action against a blocked account must be, in the light of the purposes of a freezing control, it is suggested that an attachment action of this nature might well be allowed in the New York courts'" (341 U. S. at 456).

Indeed, in the first *Zittman* case, this Court noted a stipulation "that consistent administrative practice treated attachments such as we have here as permissible and valid at the time they were levied" (341 U. S. at 458).

The conclusion of Respondents argument that a valid unlicensed attachment would be inconsistent with the purpose of the freezing program was also rejected by this Court in the first *Zittman* case. This contention was answered as follows:

> "We agree with the Government's assurance to the Court of Appeals in the Polish Relief case that these proceedings, in view of the fact that they do not purport to control the Custodian in the exercise of the federal licensing power, or in the power to vest the *res* if he sees fit to do so for administration, are not inconsistent with the freezing program and we think they were not invalidated or considered in Propper v. Clark, *supra*" (341 U. S. at 463).

Respondent's suggestion that the blocked funds will inure to the benefit of the United States Government if the decision below is allowed to stand is wholly without merit. Appendix 4 (Resp. Br. p. 31) shows that Petitioners, as general claimants, will receive something under 20% of their claim. The only parties benefited by the Government's successful opposition in this case are other general claimants. It is sheer nonsense to argue that by the enactment of Section 34 Congress intended that attachment liens should be invalidated in the interest of "equitable" distribution, when Section 34(i) expressly recognizes the continued efficacy of Section 9 as a procedural remedy. These arguments were all presented by the Government and rejected by this Court in the *Zittman* cases.

It follows, therefore, that Respondent's grounds for opposition to the writ have already been found untenable by this Court.

Conclusion

Respondent concedes that this case presents the particular issue left open by this Court in the *Zittman* cases. The only arguments in Respondent's brief in support of the decision below were rejected by this Court in the first *Zittman* case. The attempt to minimize the importance of the issue should not carry weight in determining whether the writ shall issue, as it is predicated upon information outside the record and because such information is misleading as to the potential importance of the case.

Respectfully submitted,

DONALD MARKS,
Counsel for Petitioners.

IN THE

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against

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' BRIEF

DONALD MARKS,
Counsel for Petitioners.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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PETITIONERS' BRIEF

Opinions Below

The decision of the District Court (R. 45) is unreported. The opinion of the Court of Appeals (R.49-52) is reported at 198 Fed. (2nd) 708.

Jurisdiction

The judgment of the Court of Appeals (R.53) was filed on June 30, 1952. A petition for rehearing, filed on July 14, 1952 (R. 54) was denied on July 23, 1952 (R. 54). A petition for certiorari was filed on October 21, 1952 and certiorari was granted on December 15, 1952. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Questions Presented

The Court of Appeals has held that under Section 34 of the Trading with the Enemy Act, as implemented by Treasury Ruling No. 12, the Custodian may disregard an unlicensed attachment lien and refuse it a priority in the distribution of assets subsequently vested by a res vesting order. The questions presented are:

1. Whether an unlicensed attachment on enemy owned assets, valid under New York law, creates an interest, right or title sufficient to support an action by the attachment creditor and the Sheriff under Section 9(a) of the Trading with the Enemy Act?

2. Whether the Custodian is empowered by Section 34 of the Trading with the Enemy Act to refuse recognition to an unlicensed attachment lien and treat an attachment creditor, for purposes of distribution of vested attached assets, on the same basis as a general creditor?

Statutes and Regulations Involved

The pertinent portions of the Trading with the Enemy Act (50 U. S. C. App., Sections 5(b), 9(a) and 34), Executive Order No. 8389 (5 F. R. 1400) as amended by Executive Order No. 8785 (6 F. R. 2897), and General Ruling No.

12, issued April 21, 1942 by the Treasury Department (7 F. R. 2991) are set forth in the Appendix, *infra*, pages 24, *et seq.*

Specification of Errors

The Court of Appeals erred:

1. In refusing to apply the underlying premise of the two Zittman decisions * that an attachment lien upon blocked property is valid though secured without first having obtained a Treasury license.

2. In holding that Congress had the power to and did authorize the denial of priority to "unlicensed" attachment liens, valid under State law and secured prior to a vesting order, in the distribution of the vested attached assets by the Custodian.

3. In construing Section 34 of the Act as indicating the intention of Congress to deprive "unlicensed" attachment liens of priority in the distribution of the vested attached assets by the Custodian.

4. In holding that Treasury Ruling No. 12 prohibits the acquisition of a valid attachment lien in the absence of a Treasury license.

5. In sustaining the validity of the licensing power granted to the Custodian by Section 5(b) of the Act, as implemented by General Ruling No. 12, in the absence of guiding criteria for the exercise of such power.

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* *Zittman* v. *McGrath*, 341 U. S. 446 and *Zittman* v. *McGrath*, 341 U. S. 471, are referred to herein respectively as Zittman No. 1 and Zittman No. 2.

Statement *

This is a suit under Section 9(a) of the Act based upon a lien secured by petitioners through an attachment issued by the Supreme Court of the State of New York on a debt owed by the attachment debtor to Japanese nationals. The suit was brought after the Custodian refused to issue petitioners a license permitting the attachment debtor to pay the amount of the lien to the Sheriff of the City of New York.

The facts, which are not in dispute, are as follows:

Petitioners (except the Sheriff) are New York security and commodity brokers and United States citizens (R. 22). In 1934 they opened a margin account in favor of T. Itoh; the account was guaranteed by C. Itoh & Co. Ltd. which was succeeded by Sanko Kabusiki Kaisya (herein referred to as Sanko) (R. 22). All three were Japanese nationals (R. 22-23). The account was closed out in March 1938 when the customer was indebted to petitioners in the amount of $43,341.37 (R. 23). On November 8, 1941, the indebtedness was assumed by Sanko (R. 23). At the outbreak of the war, the indebtedness had been reduced to $19,796.85 (R. 23).

On June 14, 1941, Executive Order 8389 became effective as to Japan (App. p. 32, *infra*).** Among the assets blocked by Executive Order 8389 was a debt owed Sanko, petitioners' debtor, by Anderson Clayton & Co., an Ameri-

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* The Office of Alien Property and the Alien Property Custodian will be referred to in this brief as the Custodian. The Trading with the Enemy Act will be referred to as the Act.

** The Executive Order prohibited certain transactions, including (Section 1E) "All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States;"

can corporation (R. 24). That debt was not vested by the Custodian until June 27, 1947.*

On June 28, 1943, petitioners attached the Anderson Clayton debt to Sanko pursuant to a warrant of attachment issued by the Supreme Court of the State of New York (R. 24). In that suit, judgment was entered in favor of petitioners in October, 1946 and amended in February, 1948, to increase the amount recoverable because of the discovery of the additional amount of indebtedness resulting from the voluntary turn-over by Anderson Clayton & Co. to the Custodian in July, 1947. The judgment, as amended, was in the sum of $29,633.24 (R. 25-26).

On November 20, 1946 petitioners applied to the Treasury Department for a license to permit Anderson Clayton & Co. to pay the funds then in its possession to the Sheriff (R. 14). This application was denied on February 15, 1947 because the Custodian refused to consent (R. 14).

Petitioners then filed a notice of claim under Section 9(a) of the Act. On February 15, 1949, the claim was dismissed by the Hearing Examiner, who treated it as an application for a retroactive license (R. 16). His action was sustained upon appeal by the Director of the Office of Alien Property (R.17).

On April 28, 1949, petitioners brought the present suit under Section 9(a) of the Act seeking a decree declaring that they have a lien upon the vested property, that respondent holds the property subject to the lien, and seeking a direction that respondent pay to the Sheriff such part of $29,633.24 as is necessary to satisfy petitioners'

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*On June 27th, 1947, Vesting Order 9282 directed Anderson Clayton & Co. to pay to the Custodian the sum of $5101 (R. 24-25). On July 18th, 1947, Anderson Clayton & Co. paid to the Custodian in compliance with Vesting Order 9282 the sum of $5100.59 and, in addition, the sum of $24,532.65 as a voluntary turn-over (R. 25). On November 25, 1947, Vesting Order 10253 was issued by the Custodian covering the amount of $24,532.65 previously turned over to him (R. 25).

judgment with interest and costs (R.16). Respondent moved for judgment on the pleadings and petitioners cross-moved for summary judgment (R. 21-22). The District Court denied respondent's motion and granted petitioners' motion on the authority of *Zittman* v. *McGrath*, 341 U. S. 446 (R. 45).

The Court of Appeals reversed. The Court agreed that petitioners could maintain a Section 9(a) suit if they had an "interest, right or title" in property held by the Custodian, but concluded that an unlicensed attachment conferred no such "interest, right or title". It held, therefore, that the attachment creditor is not entitled to preferential treatment in the distribution of the vested attached assets by the Custodian (R. 50-52). The reasoning of the Court of Appeals was that Section 34 of the Act contemplates "the idea of equality" in the distribution of assets held by the Custodian, that Congress gave authority to the Treasury to nullify attachment liens obtained after the freezing order, and that Treasury Ruling No. 12 was an exercise of that authority (R. 51-52).

Summary of Argument

This Court in the *Zittman* cases held that post-freezing attachments pursuant to state law could create valid liens despite the absence of a license under Executive Order 8389. It held further that General Ruling No. 12 did not in itself invalidate such liens.

This Court did not leave open the broad question of lien validity vis-a-vis the Custodian, as a lien valid against the debtor must be good against the world if it is to be effective. The question left open in the *Zittman* cases was under what circumstances, involving federal questions of administration or distribution, the Custodian might put in issue the enforceability of a valid lien.

Section 34 does not empower the Custodian, in the absence of such a federal question, to refuse recognition to

petitioners' lien, and thus to reduce petitioners to the status of general creditors in the distribution of vested assets.

In this case, the Custodian did not raise any federal question involving the administration of the vested assets. The District Court, therefore, properly held that the attachment lien constituted an interest, right or title in property under Section 9(a) of the Act and that petitioners were entitled to enforcement of their lien as provided in Section 9(a), and, therefore, to an order directing the entry of summary judgment in their favor.

Argument

The conflict between petitioners and respondent is essentially simple. No question of possession or control of vested assets is involved. The issue is whether Congress could or did give the Custodian the power of an extraordinary court in bankruptcy to be exercised without the safeguard of judicial review in the distribution of vested assets.

The Court of Appeals held that the Custodian could reject petitioners' attachment lien although the record shows that in other cases such liens have been accorded a preferred status.*

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* Paragraph 25 of the complaint alleges that: "* * * the Office of Alien Property and its predecessor, the Alien Property Custodian (R. 17), have caused or permitted payment to be made from assets of alien enemies to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment * *.*" Respondent did not deny that allegation. Indeed, by failing to deny it, and moving for summary judgment, he may be deemed to have admitted the truth of the allegation. Interrogatories submitted by petitioners, the answers to which would have shed light on the practice of the Custodian in these cases, were not answered because of the granting of petitioners' motion for summary judgment (R. 26-28). Respondent appears to have permitted such a payment to be made in *Murray Oil Products* v. *Mitsui & Co. Ltd.*, 55 Fed. Supp. 353, aff'd 146 Fed. (2d) 381.

We believe that the Court of Appeals erred in its conclusion and in the steps by which it reached that conclusion. We show in this brief that the decision below is inconsistent with the teaching of the *Zittman* cases. Even if the effect of these decisions as to the validity of the attachment lien be passed for the purpose of the argument, we show that Congress did not, by Section 34 of the Act, give the Custodian power to deprive such lien of priority in the distribution of vested assets, and that Treasury Ruling No. 12 did not have the effect of invalidating such liens.

I.

The state law attachment created a valid lien which is an interest, right or title sufficient to support a Section 9(a) suit.

A. The validity of the lien is established by the *Zittman* decisions.

(1) Analysis of the *Zittman* decisions.

In *Zittman No. 1* this Court, reversing the Court of Appeals for the Second Circuit held that attachment levies were not "'transfers" forbidden by Executive Order 8389, and that the Custodian was not entitled to a declaratory judgment that the attachment creditor "obtained no lien or other interest" in the attached property. The Custodian has issued a "right, title and interest" vesting order. This Court said that "the attachments and the judgments they secured are valid under New York law, and cannot be cancelled or annulled under a 'vesting order' by which the Custodian takes over only the right, title and interest of those debtors in the accounts * * *" (341 U. S. at 464). This Court, therefore, concluded that the attachment creditor was entitled to possession of the res.

In *Zittman No. 2* this Court held that as between an attachment creditor and the Custodian, under a res vesting order, the Custodian was entitled to possession of the property upon which the levy of attachment had been made, noting, however, that "the transfer of possession of these funds does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration" (341 U. S. at 474).

The question left open was stated as follows in *Zittman* No. 1:

> "In such case, all federal questions as to recognition by the Custodian of the state law lien, or priority of payment, are reserved for decision if and when presented in accordance with the Act" (341 U. S. at 464).

(2) The Court of Appeals erred in its interpretation of the *Zittman* decisions.

The Court of Appeals premised its decision upon the view that no valid attachment lien could be secured in the absence of a Treasury license, putting the question as follows:

> "Does a lien procured in an 'unlicensed' attachment suit give rise to a lien acquired 'lawfully' as against the Custodian when he makes a res vesting order?" (R. 52).

The Court answered this question in the negative on the ground that Treasury Ruling No. 12 "provided that any unlicensed transfer of property in a blocked account after the effective date of the Executive Order was null and void" and that an attachment was within the scope of the term "transfer" (R. 52). The conclusion that an unlicensed attachment is "null and void" is in irreconcilable conflict with the *Zittman* rationale that an attach-

ment though unlicensed is nevertheless "valid". The Court of Appeals seemed to feel that this Court in the *Zittman* cases, although deciding that an attachment lien was valid as between the parties, had left open the validity of such lien as against the Custodian. This is a much broader question than appears to have been left undecided. If a New York State attachment is "valid" it creates a lien, the settled effect of which under New York law is to give the lienor an interest in the property superior to claims of general creditors.*

"Validity" is not a fissionable concept. An attachment valid as against the debtor should be valid as against the world, and the destruction of priority is a negation of validity.

The language used by this Court in the opinion in *Zittman* No. 1 indicates that the narrow question left open is whether federal questions which may arise in the administration or distribution of the vested attached assets might supersede the right of the attachment creditor to priority in the distribution of the assets. Such questions might, for example, deal with controversies among

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* Chief Justice Cardozo noted the nature of the property interest created by an attachment lien in *Matter of People (First Russian Ins. Co.)*, 253 N. Y. 365:

> "* * * The claimant, the attaching creditor, is not asserting a claim to participate in the fund as a beneficiary of a trust, a member of the class or group for whom administration was assumed. The claim which it asserts is not in subordination to the trust, but in priority and even, in a sense, in hostility thereto. The lien of its attachment has put it in the same position as if it were the holder of a mortgage or of an equitable lien, the product of agreement. A receiver or other officer taking such a fund into his custody, must take it as he finds it, with all its imperfections on its head. One of those imperfections for this receivership was a lien created as security, not for principal alone, but for principal and interest. The fund is not free until the lien has been discharged." (p. 368).

lien claimants, questions of relative priorities of liens, the time of payment and other like problems. Obviously, the mere fact of distribution of the vested assets is not in itself a Federal question.

It is plain that the Court below did not thus interpret the *Zittman* decisions. It held broadly that the Custodian may deny recognition to a valid attachment lien without assigning any reason for his action. But an arbitrary exercise by the Custodian of an asserted power does not in itself involve a federal question warranting non-recognition of the lien.

We show below (*infra*, pp. 22, 23) that the Custodian has not established that there is in this case any federal question the answer to which would require the reduction of an attachment lien or to the status of general creditor. In the absence of such a question the decision below is inconsistent with the *Zittman* decisions.

B. An unlicensed attachment lien gives rise to a Section 9(a) title claim.

Section 9(a) (Appendix, p. 25) provides in part that "Any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property * * * may file with the said custodian a notice of his claim under oath * * *. * * * said claimant may institute suit in equity * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * *."

The words "interest, right or title" are of the broadest import and have been so construed. Only this year in

Kaufman v. *Societe Internationale etc.*, 343 U. S. 156, 72 S. Ct. 611,

this Court held that Section 9(a) is available to non-enemy stockholders of a corporation organized under the laws

of a neutral nation, even though it has been found that the corporation is enemy dominated. If the inchoate and indirect interest of a stockholder in corporate assets is sufficient to satisfy the requirement of an "interest, right or title", it would seem to follow clearly enough that a valid attachment lien, even though unlicensed, is an interest sufficient to support a Section 9(a) suit.

II.

The Custodian may not deny recognition to such a lien in distributing vested assets.

A. Section 34 does not require equality among claimants, as construed by the Court of Appeals.

We have shown above that by denying recognition to petitioners' attachment lien the Court of Appeals, contrary to the teaching of the *Zittman* decisions, has in effect denied the validity of that lien. But even passing the holding of the *Zittman* cases on this point, we submit that the Court of Appeals' holding was based upon a construction of Section 34 of the Act that is demonstrably erroneous.

The attempt to justify this result on the theory that Section 34 required "equality" among creditors is untenable. The history of Section 34 demonstrates this fact.

Section 34 was embodied in a bill to amend the First War Powers Act of 1941, the purpose of which was explained in House Report No. 2398, 79th Congress, Second Session. Section 34 (which was numbered 35 in the bill) was intended "to provide machinery for paying claims of creditors against the former owners of vested properties on an equitable basis to the extent that the assets vested from each debtor permit" (House Report No. 2398 at p. 1).

Section 35 of the bill (Sec. 34 of the Act) was at least in part the result of the decision of this Court in *Markham*

v. *Cabell*, 326 U. S. 404, which held that an ordinary creditor of an enemy alien had the right to sue the Custodian under Section 9(a) and to be paid on a "first come, first served" basis (House Report, No. 2398, at pp. 9-10).

The Committee disclaimed any intention to change the status of a secured creditor or a creditor claiming a lien, saying:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection (i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors" (House Report No. 2398, at p. 15).

The language of the section itself refutes the conclusion of the Court of Appeals that the principle of "equitable distribution" was intended to reduce lien creditors to the status of debt claimants. Section 34 (i) provides that "the sole relief and remedy available to any person seeking satisfaction of a debt claim * * *" shall be that provided in Section 34; but this is limited by the proviso "that no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor

shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding."

This is a plain recognition that the remedies provided by Section 9(a) of the Act remain unimpaired. An attachment creditor thus is one of the class of creditors whose rights under Section 9(a) are expressly preserved.

Judge Frank, in his opinion below, said: "The absence of any provision according priority to attachment liens indicates an intention to deprive them of any preferential position". We submit to the contrary, that the absence of any provision in Section 34 indicating an intention that attachment liens should be deprived of the status theretofore enjoyed under Section 9(a) demonstrates that Congress did not intend to reduce the attachment creditor to the status of an unsecured creditor. This Court said in *Markham* v. *Cabell,* 326 U. S. 404, at 411:

> "We can find no indication in the 1941 legislation that Congress by amending Section 5(b) desired to delete or wholly nullify Section 9(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

The desire of Congress to preserve the rights theretofore existing under Section 9(a) is affirmatively expressed in the following statement in Senate Report No. 1839, 79th Congress, Second Session, at page 2:

> "The bill as thus amended preserves in full these rights under Section 9(a) which the friendly foreign national, together with the United States citizen has had for more than 25 years under the act."

The decision below has engrafted a limitation upon Section 9(a) which is not justified by the wording of Sec-

tion 34 or by the express policy of Congress which led to the enactment of that Section.

In its decision, the Court of Appeals referred to the conclusions reached by Justices Reed and Burton in *Zittman No. 1* (R. 52). These views were not directed to the question now under consideration. Moreover, it may be observed that these views were expressed in a dissenting opinion. In contrast, there should be noted the concurring opinion of Mr. Justice Douglas, in which he said:

> "But the policy of the Act is in no way subverted by recognition of a lien which can ripen into a priority only if payment would have no such effect. Denial of the lien could be made only if the Act called for an equality of distribution among claimants, regardless of their innocence or guilt. I can find nothing in the Act which warrants leveling the good faith lien claimant to the unsecured status of the others" (341 U. S. 442, at 465).

In a footnote, Mr. Justice Douglas calls attention to the fact that.

> "The priority of debt claims contained in Section 34(g), 60 Stat. 925, 928, does not purport to deal with creditors preferred by reason of a lien lawfully acquired in judicial proceedings" (341 U. S. 442, at 465).

It would appear that the Court of Appeals read into the word "equitable" as used in Section 34 a meaning which is not justified by the history of the statute and the context of the language. Judge Frank's view that the words of Section 34 "suggest repugnance to the notion that the race should be to the swift among the creditors" (R. 51) is in direct conflict with the position of Mr. Justice Douglas.

An interesting comment on the *Zittman* cases dealing with the point of priorities among creditors is to be found in the American Journal of Comparative Law (Vol. 1, No. 4, p. 395), where the author says (at p. 400):

> "It is not fanciful to predict that a new priority may be read into 34(g). It seems safe to say that the Supreme Court was convinced that the attaching creditor procured a greater 'interest' than the right to apply for a license. There appears no conceivable 'interest' between the latter and a priority under 34(g). Diligence, not unfair, should still have its reward."

It is submitted that Section 34 does not empower the Custodian to deny recognition to the attachment lien.

B. General Ruling No. 12 does not invalidate an unlicensed attachment lien.

The Court of Appeals' view of General Ruling No. 12 upon which its decision rests, is in irreconcilable conflict with the interpretation of that Ruling adopted by this Court in *Zittman No. 1.* The Court of Appeals reasoned that, although General Ruling No. 12 provided that an unlicensed transfer of property in a blocked account was "null and void", the attachment in the case at bar could be valid as between the parties, but invalid as against the Custodian. General Ruling No. 12 is thus given a meaning which is neither justified by its language nor required by any considerations of policy in the administration of the Custodian's office.

Mr. Justice Jackson in his opinion in *Zittman No. 1* gave careful consideration to the Ruling, pointing out that if the Government's construction of the Ruling were adopted, the result would be "inconsistent and irreconcilable with the contentions made one day after its issuance

by both the Treasury and the Department of Justice to the New York Court of Appeals" (341 U. S. at 453).

The majority opinion quoted extensively from a brief *amicus curiae* dated April 22, 1942, filed by the Treasury and the Department of Justice in the New York Court of Appeals in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332. We suggest particular note of one sentence quoted from that brief: "So far as foreign funds control is concerned, there can be an attachable interest under New York law with respect to the blocked assets" (341 U. S. at 455).

After considering the shift in the Government's position following the decision of this Court in *Propper* v. *Clark*, 337 U. S. 472, this Court concluded as follows:

> "But, as the Government before that decision so unequivocally urged upon the New York Court of Appeals, attachment proceedings as pursued in these cases have no such consequences. Nothing in these state court proceedings have purported to frustrate the purposes of the federal freezing program. On the contrary, the effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the German nationals. There is no suggestion that these attachment proceedings could in any manner benefit the enemy. The sole beneficiaries are American citizens whose liens are not derived from the enemy but are adverse to any enemy interests. And, if no federal freeze orders were in existence, these state proceedings would tie up enemy property and reduce the amount available for enemy disposition. We agree with the Government's assurance to the Court of Appeals in the Polish Relief case that the proceedings, in view of the fact that they do not purport to control the Custodian in the exercise of the federal

licensing power, or in the power to vest the res if he sees fit to do so for administration, are not inconsistent with the freezing program and we think they were not invalidated or considered in Propper v. Clark, supra" (341 U. S. at 462, 3).

This Court thus has held that General Ruling No. 12 properly construed does not require a Treasury license as a condition precedent to a valid attachment under State law. The Treasury and the Department of Justice have said that considerations of administration do not impel the interpretation of General Ruling No. 12 which the Government urged in the *Zittman* cases. If the so-called "unlicensed" attachment is valid, then plaintiff, as a lien creditor, has statutory rights under Section 9(a) which cannot be brushed aside by a factitious distinction that the lien, though valid as between the parties, is invalid against the Custodian.

C. Congress has not given the Custodian the powers of a bankruptcy court.

It is suggested in the opinion of the Court of Appeals that the power to nullify attachment liens has been granted by Congress to the Custodian on the analogy of the nullification of preferences in bankruptcy. There is nothing in the Act to support the view that Congress intended to grant to the Custodian the extraordinary powers of a bankruptcy court. Indeed, it is questionable that Congress could constitutionally do so.

> *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139;
> *Lynch* v. *United States*, 292 U. S. 571.

This aspect of the matter is considered in the article in the American Journal of Comparative Law mentioned above. The author makes the following observations:

"* * * This statutory nullification of liens acquired by aid of the judicial process is perfectly defensible and desirable where an estate is in liquidation and the unfortunate debtor, by discharge, is given a chance to start over again. If that is the context, it may well be equitable to deprive a creditor of lawfully acquired security. But to what extent is this true as regards property vested by the Custodian? The estate is not in liquidation in any technical sense. Even as regards German and Japanese properties, which by section 39 of the Act are not to be returned to their former owners, the analogy is not persuasive since such debtors are amenable to suit and their other assets, if any, can be reached. As regards other 'enemies' such as the Swiss, the analogy seems even less persuasive. Furthermore payment of claims by the Custodian does not purport to discharge the debtor. Hence it would seem that the claimant who has no such 'interest' as Zittman cannot complain of discrimination. He can still pursue his claim against the debtor." (Am. Jour. of Comparative Law, Vol. I, No. 4, at p. 400.)

D. The recognition of petitioners' attachment lien does not result in discrimination among attachment claimants.

The Court of Appeals suggests that since, in some states, an attachment does not create a lien, the granting of such preferences will result in a lack of uniformity in an area which is peculiarly of national concern.

Where the battle is between claimants to the vested property, the respective rights are not a matter of national concern. Differences in creditors' rights necessarily are inherent in our system of state law. Since the Act places in a separate category as title claimants those who can

show an "interest, right or title" in the vested property, it is necessary that rights and interests created by state law shall be recognized in the determination of title claims.

Attachment lien interests are no different in this respect than mortgage or pledge interests. The fact that creditors in different states may fare differently is no justification for refusing recognition to the respective state laws. The rejection of petitioners' attachment lien on the ground that some other state might not recognize such a lien in similar circumstances means that we permit such other state to make the law for all the states. The reduction of all claimants of this class to the status of general creditors may be equality, but it is not equity.

This Court has frequently refused to bow to the demand for uniformity, in recognition of the fact that our federal system imposes a scrupulous regard for the differences of local law. The mere fact that the problems of war-time control of enemy property have placed such property in the hands of the Government for administration should not lead to the rejection of established concepts in local laws in the determination of those who are entitled to such property, when the Government is about to distribute it.

E. The Custodian's power, as construed by the Court of Appeals, is arbitrary and unlimited.

The Court of Appeals said that General Ruling No. 12 (as interpreted by it) was an appropriate exercise of the licensing power granted to the Custodian by Section 5(b) of the Act. The record shows that two applications for license by petitioners were denied (R. 24, 26). No reasons were given for such action. On the other hand, some unlicensed attachments have been favored by the Custodian (R. 17). We are informed, for example, that the Custodian granted a license and paid the amount of the attachment lien sustained in

Murray Oil Products v. *Mitsui & Co. Ltd.*, 55 Fed. Supp. 353, affd 146 Fed. (2d) 381.

The power given to the Custodian is thus arbitrary and unlimited. In the absence of criteria for the guidance of an administrative official in the exercise of a delegated licensing power, the very grant of power may be subject to challenge.

See, *e.g.*,

Panama Refining Co. et al. v. *Ryan*, 293 U. S. 388;
Morgan et al. v. *United States, et al.*, 304 U. S. 1.

The position taken by the Court of Appeals goes far beyond the needs of policy behind Section 5(b). An interpretation of the Act which avoids this issue is called for. If General Ruling No. 12 is limited as indicated in the opinion in *Zittman No. 1*, the question of the extent of the Custodian's discretion in the exercise of the licensing power may be put aside for decision in an appropriate case.

F. The decision of the Court of Appeals presents a constitutional question.

The Fifth Amendment to the Constitution of the United States denies to Congress power to transfer property from one to another directly or indirectly. The right to retain a lien until the debt secured thereby is paid is a substantive property right.

Such property may be taken by the Government under its war powers without compensation. That, however, is not the problem here. The refusal to recognize petitioners' attachment lien enures to the benefit of general creditors. In effect, it enhances the share which general creditors will receive, at the expense of petitioners.

It is unnecessary to push the constitutional question thus presented as it is apparent that a construction of the statute which will result in recognition of petitioners' lien will avoid such problems.

III.

The Custodian raised no federal question in this case to justify the denial of enforcement of petitioners' lien.

A. No question of administration has been raised.

In the District Court, respondent moved for judgment on the pleadings and petitioners made a cross-motion for summary judgment. An affidavit was submitted in support of the cross-motion for summary judgment (R. 22-28). No affidavit was submitted in opposition to that motion. The record shows that a letter was submitted by the Department of Justice to the District Judge on the settlement of the order granting the motion for summary judgment (R. 34-37). The correspondence related solely to the form of the order and the inclusion therein of a provision for payment of the Sheriff's poundage fees.

There has been no claim made by the Custodian that the relief sought by petitioners would in any way interfere with the orderly administration of the vested assets. There has been no conflict of lien claims or other federal question raised by the Custodian in opposition to petitioners' suit. Without attempting to limit the scope of the federal questions which might justify the Custodian in contesting a Section 9(a) suit, we believe that nothing in the record in this case can justify such action. Therefore, under Section 9(a) petitioners were entitled to an order directing the Custodian to pay their claim.

B. The decision of the Court of Appeals results in a real loss to petitioners.

The brief filed by respondent in opposition to the petition for a writ of certiorari showed that the vested assets of Sanko aggregate $36,236.02. Claims filed aggregate $192,371.38.

Unless petitioners' attachment lien is accorded a Section 9(a) status, petitioners will be reduced to the level of general creditors. On the figures given above, petitioners would thus receive not more than 19% of the amount of their claim. Their loss, therefore, will be not less than $16,000.

C. The Custodian has not brought himself within the area of the question left open in the *Zittman* cases.

This Court indicated in the *Zittman* cases that there might be situations in which the Custodian could contest the enforcement of a valid attachment lien through a Section 9(a) suit. No catalogue of such cases need be made for the purposes of this litigation. The Court of Appeals took the dictum of *Zittman* to mean that the Custodian may not only contest the lien when a federal question justifies such action, but may arbitrarily reject it without cause. We submit that this Court indicated just the opposite of that rule. There having been no justifying ground for opposition by the Custodian, petitioners' lien was entitled to enforcement as prescribed by the District Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and that of the District Court reinstated.

Dated: January 12, 1953.

DONALD MARKS,
Counsel for Petitioners.

APPENDIX

1. Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1, et seq.:

* * * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5;

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person, as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or per-

son may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * *

§ 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it

has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * *

SEC. 34(a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any

person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting

in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money

available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of

the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided*, That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the

Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * *

2. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897;

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury, by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to, the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidence of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * *

3. General Ruling No. 12, April 21, 1942, 7 F. R. 2991:

SEC. 131.12

(a) Unless licensed or otherwise authorized by the Secretary of the Treasury, (1) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (2) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(b) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(c) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(d) Any transfer affected by the Order and/or this general ruling, and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining

for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(e) For the purposes of this general ruling:

(1) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power: *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(2) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2(1) of the Securities Act of 1933, as amended), bills

of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

* * *

IN THE

Supreme Court of the United States

October Term, 1952

No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE and HERBERT R. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & CO. and JOHN J. McCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

against

JAMES P. McGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

DONALD MARKS,
Counsel for Petitioners.

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PETITIONERS' REPLY BRIEF

Respondent does not reach the issue in this case until the last point in his brief, when, at Page 41 and following, he considers the effect of this Court's decisions in the *Zittman* cases. Up to that point, respondent presents again, in revised form, the arguments which were rejected by this Court in the *Zittman* cases, and which, if adopted, would nullify the effect of those decisions. He urges again that

the policy of Congress, as disclosed in Section 34 of the Trading with the Enemy Act, adopted in 1946, was to immobilize enemy assets and thus prevent the acquisition of any interest therein by an unlicensed attachment creditor. He argues that the freezing program would be frustrated by the recognition of a property interest acquired by attachment process after the date of the Executive Order. These arguments lead to respondent's conclusion that petitioners did not acquire an "interest, right or title" in the attached property. They ignore the effect of *Zittman No. 1,* in which this Court held that such an attachment creditor has a valid lien upon the property sufficient to exclude the right of the Custodian to possession under a right, title and interest vesting order.

To the extent to which respondent's arguments have not been disposed of in petitioners' main brief, we shall deal with them here.

I.

In Part I of his brief, respondent makes an assumption as to the legislative policy of Congress with respect to the payment of creditors' claims, which is not justified by the history of the Trading with the Enemy Act. He argues that in enacting Section 34 in 1946, Congress indicated an intention that assets should be equitably distributed by the Custodian and that petitioners must seek their remedy under Section 34.

The argument ignores the fact that Section 34 deals only with "debt" claims, and that petitioners' is a "title" claim. Respondent ignores the specific proviso of Section 34(i) that no proceeding taken under Section 34 shall bar a person claiming an interest, right or title from proceeding under other sections of the Act. Thus, a "title" claimant may proceed both under Section 9(a) and under Section 34, and if his claim is not wholly satisfied by the return of the prop-

erty in which he claims an interest, his Section 34 claim is not prejudiced by the successful pursuit of his Section 9(a) claim.

In view of the fact that petitioners stand upon the proposition that their unlicensed attachment lien created an interest, right or title sufficient to support a Section 9(a) suit, respondent's extended argument as to the intent of Congress with respect to the distribution of assets to debt claimants is wholly beside the point.

II.

In Part II of his brief, respondent presents an elaborate argument to the effect that the objectives of freezing and the terms of the freezing order would plainly be violated by granting petitioners relief in this case.

At page 33 respondent argues that "it was a major purpose of freezing to preclude" the acquisition of a property interest by attachment after the freezing order. The reason, respondent says, was that "the inevitable delay in vesting some property should not be allowed to have the effect of reducing the amount ultimately available for governmental purposes. Equally plainly, it would be inequitable to let the extent of creditors' rights depend upon the time when the particular debtor's property was vested" (Resp. brief, p. 31).

This reasoning would give the freezing order the same legal effect as a res vesting order. But the Trading With the Enemy Act does not support this view. Property rights may be acquired by citizens in blocked property before res vesting. This Court's decision in *Zittman No. 1* makes this clear, and respondent concedes as much in noting at page 42 of his brief that the effect of the decision in *Zittman No. 1* is that as against the foreign debtor, the attachment and the judgment which it secures are valid.

Such property rights may not be brushed aside on the ground that it would have been desirable that vesting orders have retroactive effect to the date of freezing.

The short answer to respondent's argument that there is a conflict between the purposes of the freezing program and the position taken by petitioners in this case is found in the following language of Mr. Justice Jackson in *Zittman No. 1* (341 U. S. at 463):

> "Nothing in these state court proceedings have purported to frustrate the purposes of the federal freezing program. On the contrary, the effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the German nationals. There is no suggestion that these attachment proceedings could in any manner benefit the enemy. The sole beneficiaries are American citizens whose liens are not derived from the enemy but are adverse to any enemy interests. And, if no federal freeze orders were in existence, these state proceedings would tie up enemy property and reduce the amounts available for enemy disposition. We agree with the Government's assurance to the Court of Appeals in the Polish Relief case that these proceedings, in view of the fact that they do not purport to control the Custodian in the exercise of the federal licensing power, or in the power to vest the *res* if he sees fit to do so for administration, are not inconsistent with the freezing program and we think they were not invalidated or considered in Propper v. Clark, supra."

Since this Court has recognized that there is no conflict with the purpose of the freezing program in the recognition of a valid unlicensed attachment lien, it necessarily follows that there is no such conflict when the lienor seeks the assistance of the Court under Section 9(a) of the Act to enforce

his lien, unless the Custodian at that point can show good cause in the administration of the vested property for withholding enforcement of such lien.

As to the terms of the freezing order, we turn again to the conclusion of this Court in the *Zittman* cases that Executive Order 8389 as amended by Executive Order 8785, 6 F. R. 8297, did not prevent the acquisition of a valid attachment lien without a license. Mr. Justice Jackson considered this argument carefully, observing that "* * * consistent administrative practice treated attachments such as we have here as permissible and valid at the time they were levied" (341 U. S. at 458).

Respondent again urges that *Propper* v. *Clark*, 337 U. S. 472, warrants the conclusion that the language of the freezing order prohibited the acquisition of a valid attachment lien because it forbade "transfers of credit" (see Brief, p. 34). We submit that this again is disposed of by the decisions in the *Zittman* cases. However, it may be noted, in addition, that the levy of an attachment is not a dealing in or transfer of an evidence of indebtedness or an evidence of ownership of property within the meaning of the Executive Order. We further contend that the acquisition of such a lien is not a "transfer" within the meaning of the Order. Thus, the basis for respondent's argument that the acquisition of the attachment lien violated the terms of the freezing order is without force or substance and is, in essence, an attempt to relitigate *Zittman No. 1.*

Respondent argues in Section C of Part II of his brief that we assert that by General Ruling No. 12 and the accompanying practice of the Treasury Department, the attachment was licensed. We have not made such an argument but, on the contrary, have claimed that the absence of a license did not prevent the acquisition of a valid property interest sufficient to support a Section 9(a) suit.

III.

In the last point in his brief, respondent argues that the question left open in the *Zittman* cases may only be answered in this case by the conclusion that the Custodian had the authority to disregard petitioners' attachment lien as a matter of general policy and without assigning any reason pertinent to the administration of the vested assets. Respondent argues that while the attachment lien may be valid as between the parties, it is not valid as against the Custodian and that petitioners "now seek, not recognition of a lien which freezes the funds so as to prevent a private transfer of them, but recovery from the Custodian of the entire interest in the funds" (Brief, p. 45).

What is the practical effect of the *Zittman* decisions if the Government is sustained here? Starting with the premise that the lien of an unlicensed attachment is entitled to "recognition", where does it leave the lienor to say that it may be ignored by the Custodian—not for good and sufficient reasons, but arbitrarily and as a matter of general policy?

We cannot believe that this Court will now say that the *Zittman* decisions were without practical significance. The question reserved in those cases necessarily places a burden on the Custodian to justify his refusal to recognize an unlicensed attachment lien. Absent such justification by the Custodian, the command of Section 9(a) clearly imposes a duty upon the District Court to order payment to the lienor.

This mandate of the statute may not be defeated by arguments of policy as to the purpose of the Treasury to preserve the interest of the United States in the fund or to apply it ratably among claimants. Mr. Justice Holmes dealt with similar arguments in *White* v. *Mechanics Securities Corporation*, 269 U. S. 283 in the following characteristic language:

> "The United States seized the property in question from an enemy and of course could do with it what

it liked. When it comes into court and seeks to appropriate it there is a natural notion that it has elected to use its power. Its power could not be denied if the Attorney General were the complete mouthpiece of its will. But whatever his authority it is subordinate to Congress; and Congress has more authentically declared the sovereign intent by the statute to which we have referred. The statute gives an absolute right to the suitor who comes within its terms, unqualified by any reservation of a superior lien in case the United States should be a rival creditor" (269 U. S. at 301).

The effect of recognizing petitioners' lien is not to remove all federal freezing controls, nor to frustrate the purpose of these controls, nor to violate the principle of equitable distribution as embodied in Section 34 of the Act. As has already been pointed out, Section 34 deals only with debt claims and it does not purport to place lien claims in the same category for purposes of distribution. As for respondent's foreboding that freezing controls will be nullified by upholding petitioners' claim, it should suffice to point out that this no more follows than that the controls have been frustrated by the recognition of property interests such as those dealt with in *Kaufman* v. *Societe Internationale, etc.*, 343 U. S. 156.

If the Custodian has any factual basis for opposing payment of a legitimate lien claim in a Section 9(a) suit, he has ample opportunity to present such reasons to the Court. It is not necessary to give him arbitrary and unrestricted power to disregard a single class of lien claims in order to preserve the structure of the freezing program.

We have here one narrow issue, the determination of which has been exaggerated by the Custodian out of all proportion to its importance in the administration of vested

assets. The Custodian's argument that the recognition of such unlicensed attachment liens will threaten the vesting program is palpably unreasonable.

IV.

In a footnote, on Page 5 of his brief, respondent asserts that if this Court should hold petitioners entitled to recover, the question of allowability of interest should be remitted to the Court of Appeals on remand for consideration. We submit that such a remand is unnecessary and would only lead to further delay in the termination of this litigation.

The District Court allowed interest on the authority of *People* v. *The State of New York* (*First Russian Ins. Co.*, 253 N. Y. 365). In that case, it was held that the Receiver, who took possession of the fund, did so subject to the attachment lien obtained by a creditor and that the attachment lien carried interest.*

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* The general principle as to allowance of interest covering a period when performance is suspended by the effect of war was stated by Mr. Justice Holmes in *Hicks* v. *Guinness*, 269 U. S. 71, as follows: "The denial of interest for the time covered by the war seems to us wrong. The cause of action had accrued before the war began, *Young* v. *Godbe*, 15 Wall. 562, 21 L. Ed. 250, and after it had accrued the question was no longer one of excuse for not performing a contract, but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course while the damages remain unpaid interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interests have led to a diversity of decisions but here again what we regard as principle has prevailed in later days, *Miller* v. *Robertson*, 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265; *Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft fur Cartonnagen-Industrie*, (1918) A. C. 239, 245; s. c. (1917) 1 K. B. 842, 850."

The allowance of interest is justified by decisions under the Trading with the Enemy Act, prior to World War II. See

Miller v. *Robertson*, 266 U. S. 243;
Sutherland v. *Kanawha Valley Bank*, 48 F. 2d 1027 (C. A. 4th).

It should also be noted that interest was paid to the attachment creditor in *Murray Oil Products* v. *Mitsui Co. Ltd.*, 55 Fed. Supp. 353, aff'd 146 Fed. (2d) 381. There, the order entered on consent of the Custodian on February 21st, 1945 provided for payment of interest and Sheriff's fees (R. 38, Civil Action 18-459 S. D. N. Y.). Respondent attempts to minimize the significance of this case by an observation in a footnote at Page 41 of his brief that the Custodian and the Department of Justice "did not deem that case a suitable vehicle in which to make the first test of the validity of unlicensed New York attachments." It is just such arbitrary distinctions by administrative officials which subvert the constitutional policy that our Government shall be one of laws, not men. The position taken by the Custodian is justified neither by past administrative practice nor by sound statutory interpretation. There is no occasion for remanding this cause to the Court of Appeals for further consideration. On the record, the District Court correctly granted petitioners' motion for summary judgment and that order should be reinstated.

Respectfully submitted,

DONALD MARKS,
Counsel for Petitioners.

Dated: January 31, 1953.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY A. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, and HERBERT R. JOHNSON, Doing Business Under the Firm Name and Style of ORVIS BROTHERS & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

v.

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR LEO ZITTMAN, AMICUS CURIAE

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BRIEF FOR LEO ZITTMAN, AMICUS CURIAE

Pursuant to the filed consent of the parties, Leo Zittman files this brief as *amicus curiae* in support of a reversal. Zittman was petitioner in the two cases of *Zittman* v. *McGrath*, 341 U. S. 446 and 471, which, for convenience, are hereafter called *Zittman No. 1* and *Zittman No. 2*.

The Issue Here

Petitioners, Orvis Bros. & Co. (hereafter "Orvis") are commodity brokers. In June, 1943, a Japanese national, Sanko Kabusiki Kaisya (hereafter "Sanko") owed $19,796.85 to Orvis. Orvis sought to recover the debt. Since war precluded personal service of process on Sanko, on June 28, 1943 Orvis sued by attaching a frozen credit existing in Sanko's favor with Anderson, Clayton & Co. (hereafter "Acco"). Under New York and federal law, the attachment impressed a "fixed and present" [1] lien on the Acco debt to secure the Orvis claim. *Zittman No. 1*, 341 U. S. 446.

Orvis took judgment against Sanko and sought a license under the freezing controls to execute on its judgment against the attached Acco debt. Twice such a license was refused.

In June and November of 1947, the Alien Property Custodian [2] *res* vested the entire attached Acco debt. Orvis brought this suit against the Custodian under Sec. 9(a) of the Trading with the Enemy Act [3] to enforce its attachment lien against the Acco debt.

The District Court, on motion, gave judgment for Orvis. The Court of Appeal reversed.

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[1] Cardozo, J. in *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190, 208. Under New York Law, the levy of the attachment warrant impresses a lien upon the attached property as "security for the judgment the plaintiff may recover." *Fielmann* v. *Brunner*, 2 Hun 354, 356; *Lynch* v. *Crary*, 52 N. Y. 181, 184; *Embree* v. *Hanna*, 5 Johns. 101, 103.

[2] The term "Custodian" as used herein refers to either the Alien Property Custodian or the Attorney General who succeeded to his powers and duties. Exec. Order No. 9788, 11 F. R. 11981.

[3] All references herein to the "Act" are to the Trading With the Enemy Act. All references to "Sections" are to sections of that act.

The issue here is this: **Can the Custodian hold and appropriate—as well as vest—the Orvis lien interest or must he return it to Orvis in this Sec. 9(a) suit?**

The Interest of This Amicus

The attachment liens which were the subject of litigation in the *Zittman* cases are still unsatisfied. Zittman is vitally interested in any holding or opinion here which may bear on his rights as they were decreed by this Court in the *Zittman* cases.

The instant case turned upon the fact that Orvis attached after General Ruling No. 12, 7 F. R. 2991, had issued on April 21, 1942. Zittman attached months before that ruling had issued. This factual distinction would preclude the holding below from serving as a precedent for further proceedings in the *Zittman* cases and many others like it. Nonetheless, we believe that this distinction should not preclude a recovery by Orvis. If Orvis recovers, Zittman's right to recover is *a fortiori*.

ARGUMENT

I

Since, under the Zittman cases, Orvis' attachment lien is good against Sanko, it is also good against the Custodian who may hold only Sanko's interest.

Orvis' rights, pressed in this Section 9(a) suit, must be measured by the law as it was on June 25, 1943 when Orvis perfected its attachment lien. *Holt* v. *Henley*, 232 U. S. 637, 640. At that time, only two remedies were open to the American creditor as against his enemy debtor. He could sue the enemy, if the latter's property had not been vested. He could sue the Custodian under Section 9(a), if it had been vested.

Though the Sec. 9(a) remedy was available in 1943 (*Markham* v. *Cabell*, 326 U. S. 404), the Custodian had not yet vested the Acco debt. Since vesting is discretionary (*Clark* v. *Allen*, 331 U. S. 503, 511), it could not then be known whether he would ever vest. Actually, he did not vest the Acco debt until four years later, on June 27, 1947. Until such vesting, Orvis could not have sued under Sec. 9(a). And, of course, Orvis could not have filed a claim under Sec. 34 of the Trading With the Enemy Act. Section 34 did not exist until August 8, 1946.

Orvis chose the only remedy open to it—a suit against its debtor. Circumstances limited even this remedy. Sanko could not be sued *in personam*. War precluded personal service. Orvis attached; it had no other choice. In so doing, it pursued a remedy traditionally accorded to the American citizen against his enemy debtor. It is settled—both at common law and under the Trading With the Enemy Act—that, despite the existence of war, the citizen may sue the enemy and attach his property. *Watts, Watts & Co.* v. *Unione Austriaca Navigazione, etc.*, 248 U. S. 9; *Trading With the Enemy Act*, § 7(b); 137 A. L. R. 1369, note. This right to sue and attach has been reaffirmed by the Treasury in its administration of the freezing controls [4] and by this Court in the *Zittman* cases.

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[4] In the *Zittman* cases the Custodian stipulated as facts the following (341 U. S. 446, 458, n. 28):

"5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

"Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from ac-

The priority effected by the Orvis attachment lien was fully in harmony with existing state and federal law and policy. The state law accorded priority to attaching creditors in the order in which they attached. *N. Y. Civil Practice Act*, §§ 960, 680. Similarly, where the debtor's property had been seized by vesting, federal law accorded priority to the claims of citizens in the order in which they sued the Custodian under Sec. 9(a). *U. S.* v. *Securities Corp. General*, 4 F. 2d 619, 622, aff'd. 269 U. S. 283; 32 *Op. Atty. Gen.* 57.

Whatever may be the policy established by Sec. 34 in 1946, it is clear that, in June, 1943, both state and federal law measured the rights of the citizen creditor by his diligence alone.

Now, more than nine years later, the Custodian demands that, as against him, Orvis be stripped of rights legitimately garnered in 1943 under then existing state and federal law. He insists that this is required by the policy underlying the vesting power and the freezing controls. The law and settled administrative practice are to the contrary.

A

While Congress permitted the Custodian to seize the Orvis lien interest by vesting, it forbade him to appropriate it.

The Custodian seized the Orvis lien interest in the Acco debt by an unopposed *res* vesting of the Acco debt. This

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counts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. * * * **A license to institute the action and levy the attachment was in fact not required by the Treasury Department.**"

was his right. It is clear that he may *res* vest the property of friendly aliens and even of citizens. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79.

The taking decides nothing; the Custodian gains no substantive rights in the vested property. The *res* order "gives nothing but preliminary custody. It attaches the property to make sure that it is forthcoming if finally condemned, and does no more." *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569.

In this case, the *res* order merely substituted the Custodian "as possessor of the credits and funds leaving unadjudicated the effect of substitution of custody upon the attaching creditors' rights." *Zittman No. 2*, 341 U. S. 471, 473.

By *res* vesting the Custodian may take property interests which he is forbidden to appropriate. *Gussefeldt* v. *McGrath*, 342 U. S. 308, 313. The citizen may recover his interest so taken in a Sec. 9(a) suit "unembarrassed by the precedent vesting." *Stoehr* v. *Wallace*, 255 U. S. 239, 246. This is such a suit.

The issue here is **whether the Custodian could appropriate the Orvis lien interest after he had taken it.** The answer to this question must be found in the Trading With the Enemy Act—not in administrative practice. *White* v. *Mechanics' Securities Co.*, 269 U. S. 283, 301.

The Act is clear. By Sec. 5(b), Congress authorized the Custodian to vest "any property or interest of any foreign country or national thereof." But, by Sec. 34(d), it allowed him to appropriate and distribute only the "interest owned by the [alien] debtor *immediately prior* to its vesting." Sec. 34(b) enjoins him from distributing any interest which is the subject of a proceeding for return under Sec. 9(a) or Sec. 32. Sec. 9(a) compels him to disgorge any interest not enemy owned.

Secs. 34(b) and (d) and Sec. 9 state the Congressional policy with respect to vested assets. They specify that it is the alien interest at the time of vesting—not freezing—which determines what the Custodian may ultimately hold and appropriate.

The Acco debt was vested on June 27, 1947, four years after Orvis had attached. On the day of vesting, Sanko's interest in the attached debt was limited by the Orvis attachment lien. *Zittman* so holds. 341 U. S. 446, 464-5. The Custodian—like Sanko—was confined by the plain language of Secs. 9(a) and 34(d) and (i) to Sanko's limited interest. The District Court rightly held that the Custodian was required to return to Orvis its interest—an interest which, by Secs. 34(b), (d) and (i), he was forbidden to appropriate and administer and by Sec. 9(a) he was commanded to return.

The Custodian argued—and the Court of Appeals held—that though, under *Zittman No. 1*, the Orvis lien would have withstood a right, title and interest vesting, here it was destroyed because the Custodian had *res* vested. This is a misconception. Procedure—not substance—is determined by the type of vesting order issued. If the Custodian prefers to take first and to impose upon the citizen the burden of testing the Custodian's right to appropriate what he has taken, he issues a *res* order. If he prefers to test his right to appropriate before he takes, he issues a right, title and interest order. The choice is the Custodian's. But nothing implicit in the right to choose who shall initiate the test suggests that the choice shall, of itself, decide the outcome of the test.

Where the interest proposed to be taken is that of a citizen, as it is here, the Custodian must forego the taking if he has issued a right, title and interest order (*Zittman No. 1*); he must disgorge what he has taken, if he has issued a *res* order. Sec. 9(a); *Kahn* v. *Garvan*, 263 F. 909; *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569. This he must do in obedience to the Congressional dictate in Secs. 9(a) and 34(b) and (d). This Congress must require of

him in obedience to the Constitution. *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79; *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481.

The *Zittman* cases applied these principles to lien interests acquired by attaching American creditors. *Zittman No. 2*—a *res* vesting case—reaffirmed the Custodian's right to take the attached funds. The taking decided nothing. It merely substituted the Custodian "as possessor of the credits and funds, leaving unadjudicated the effect of such substitution of custody upon the attaching creditors' rights." 341 U. S. 473. Since the taking raised no issue as to the Custodian's right to appropriate what he took, this Court necessarily reserved decision on his right to appropriate until this issue was later raised. There is no jurisdiction to adjudicate the right to appropriate in a suit to enforce a taking by *res* vesting. *Miller* v. *Kaliwerke, etc.*, 283 Fed. 746, 752.

What *Zittman No. 2* thus left open, *Zittman No. 1* concluded. *Zittman No. 1*—a right, title and interest case—tested the extent of the alien interest in the attached property. It held that the alien was entitled only to the unattached residue. This—the unattached residue—thereby became the measure of the Custodian's interest since he succeeds only to the interest of the alien.

Under *Zittman No. 1* the Orvis lien bound the alien, Sanko. Of necessity, it bound the Custodian in this Sec. 9(a) suit. Here, as in *Zittman No. 1*, the Custodian is limited to the alien interest. Sec. 34(d); *J. Kahn & Co.* v. *Clark*, 178 F. 2d 111, 113; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 56.

The Custodian, having admitted,[5] as he must under *Zittman*, that the Orvis attachment lien is good as against

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[5] See Custodian's brief in the Court of Appeals, p. 8. In his brief in this Court in the *Zittman* cases, at p. 49, the Custodian said:

"Respondent does not contend that the attachments were absolutely void or that they were illegal. He agrees that freezing

Sanko, conceded the case. He cannot undo the force of that concession by arguing here for a license requirement which §§ 9 and 34 do not impose and which, in *Zittman*, this Court has already held to be unnecessary.

* * * * * *

Since Secs. 9(a) and 34(b) and (d) forbade the Custodian to appropriate the Orvis lien, the holding below is plainly error unless that holding is compelled by the freezing controls. We turn now to the freezing controls as they bear on the issues in this suit.

B

Congress did not intend to achieve by freezing a purpose which it disclaimed in Secs. 9(a) and 34.

Twice now—in *Lyon* v. *Singer*, 339 U. S. 841, and in the *Zittman* cases—this Court has held that the freezing controls permitted the citizen to sue the alien debtor, though frozen funds were involved. The suit—and the attachment of frozen funds in aid of it—need not be licensed. Such attachments without license were "permissible and valid at the time they were levied." *Zittman No. 1*, 341 U. S. 446, 458; supra, footnote 4.

The Custodian would have this Court undo here what it did in *Zittman*. He asks this on the strength of policy arguments which he pressed unsuccessfully in the *Zittman* and *Singer* cases. Again he says, by the freezing controls "the United States, acting in time of emergency leading to war, sought to maintain assets subject to them [i.e. to the freezing regulations] in *status quo* until the national policy with respect thereto should ultimately be determined by the

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did not purport to prohibit the resort to judicial process. He states simply that transfers in blocked property were proscribed and that the judicial hand was stayed to that extent. Not attachments, but transfers, were controlled."

Congress and the Executive".[6] Here, as in the *Zittman* cases, he contends that to permit the attachment of frozen funds is to impair this policy.

In every freezing controls case before this Court, the Custodian has offered this confiscatory aim as the policy underlying the controls. He offers, as authority, the views of administrative officers. Not a single apt Congressional authority is cited, though Congress is the authentic mouthpiece of its will.

Congress has left no doubt as to what it intended to appropriate and entrust to the Custodian for administration. By Sec. 34(d) of the Trading With the Enemy Act, it specified that the Custodian is to administer only the "interest owned by the [alien] debtor, *immediately prior* to its vesting"—not the alien interest as of the time of freezing. It forbade him to distribute any interest, such as that of Orvis, which was the subject of a suit for return under Sec. 9(a). With the impact of vesting so explicitly defined, it cannot be inferred that vesting was meant to be effective as of the time of freezing. No purpose could be served by permitting the Custodian to take as of the time of freezing when, under Sec. 34, he could deal only with the alien interest as of the time of vesting.

Sec. 32, enacted March 8, 1946—five months before Sec. 34—authorized the President to return to certain enemies and aliens who could not qualify under Sec. 9(a) their interests as they were immediately prior to vesting. *Gusseſeldt* v. *McGrath*, 342 U. S. 308, 315. It is unthinkable that

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[6] Respondent's brief in opposition to Orvis' petition for certiorari, p. 9.

Recently, this Court has said that returns under Secs. 9(a) and 32 are not limited by Sec. 39 which declares that returns are not to be made to nationals of Germany and Japan. Sec. 39 deals only with the residue remaining after returns under Secs. 9(a) and 32. *Gusseſeldt* v. *McGrath*, 342 U. S. 308, 315. Since, in purpose, Sec. 39 is subordinated to Secs. 9(a) and 32, there is no merit in respondent's argument that Sec. 39 should be read so as to deny the Sec. 9(a) remedy to the Orvis lien.

Congress would refuse to Orvis, a citizen, what it authorized the President to do for certain enemies whose assets had been frozen and vested.

The Government's actions—as distinguished from its arguments—belie the Custodian's notion that freezing was intended to dam up a reservoir of alien funds to be vested later for ratable distribution among American creditors and other post-war ends.[6a]

Almost one hundred general—and countless specific—licenses[7] have issued authorizing frozen funds to be applied to private ends. Licenses have issued authorizing payment of attachment liens impressed upon frozen enemy and other foreign funds at the suit of American creditors.[8] We believe that this Court will take judicial notice of the fact that, while *Lyon* v. *Singer* was pending before this Court, frozen Japanese funds there involved were licensed

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[6a] Since freezing applied to the property of alien friends as well as enemies, it is unthinkable that Congress would freeze, for future confiscation, the property of Frenchmen, Norwegians, Danes and others of our alien friends. Construed as a confiscatory measure, the controls would be a complete reversal of our traditional policy toward the property of alien friends; it would, indeed, be patently unconstitutional under the Fifth Amendment. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79, 81; *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 489, 491.

[7] The general licenses up to September 15, 1946 are compiled in the Treasury Department's publication entitled *Documents Pertaining to Foreign Funds Control*, dated Sept. 15, 1946.

[8] In the *Zittman* cases, the Custodian stipulated as facts the following (*Zittman* record in this Court, p. 66):

> "7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by the plaintiff and judgment-creditor. A license to institute the action and levy the attachment was in fact not required by the Treasury Department."

for payment to an Iranian creditor while, almost simultaneously, the same relief was denied to an American citizen. By these Executive acts the Government sanctioned the distribution of frozen funds among American and foreign creditors of blocked nationals and others long before it could be known who all of the creditors were, what their claims totalled, or what assets would be available to pay those claims and before the time for filing claims expired [9] —and, indeed, without requiring the claims to be processed under Sec. 34. These Executive acts were a wanton breach of federal law and policy if, as the Custodian says, the purpose of freezing "was to hold the funds 'as is' for subsequent disposition" [10] ratably among American creditors and for post-war purposes.

In truth, Congress initiated the controls to keep the Axis from seizing at gun point assets here belonging to the invaded countries and their nationals.[11] To this end, it empowered the President to screen transactions in frozen property and to withhold sanction from those resting on Axis conquest. Legitimate transactions were to be unaf-

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[9] Sec. 34(b), enacted August 8, 1946, authorizes the Custodian to fix a bar date for claims which shall not extend beyond two years from the date of the last vesting in the case of the particular debtor or from the date of the Act, whichever is later.

[10] Quoted from Respondent's brief in opposition to Orvis' petition for certiorari, p. 11.

[11] The freezing controls were enacted on May 7, 1940 (54 Stat. 179) by a Joint Resolution of Congress amending Sec. 5(b) of the Trading With the Enemy Act. Sen. Wagner, chairman of the committee which had reported out the Resolution, stated its purpose as follows:

> "* * * The purpose of the joint resolution, of course, is very clear. We want to protect property within the jurisdiction of the United States which is owned by these governments [Norway and Denmark] or their nationals" (86 Cong. Rec., 5006).

See also: Sen. Glass in 86 Cong. Rec. 5175-5176, and Sen. Connally in 86 Cong. Rec. 5007.

fected.[12] The frozen property was to continue subject to the claims of Americans.[13] As established by Congress, the controls were a weapon to be used solely against Axis aggression. They were a check on the use of frozen property by the Axis—not a device to immunize frozen funds from the legitimate claims of American citizens. Congress has not deviated from its purpose.

The Court of Appeals thought that, because Orvis attached after General Ruling 12, a different result is required here than would be justified in the *Zittman* cases in which the attachment preceded General Ruling 12. While conceding that General Ruling 12 validated the attachment as against the blocked national, the Court of Appeals concluded that the Ruling operated to void the attachment in the event of a *res* vesting.

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[12] "Mr. Wagner: * * * I wish to emphasize the point that *this does not absolutely prohibit the transfers, it merely provides that the Government may investigate* to determine whether the transfer was made voluntarily or under duress, to be perfectly candid. *If the transfer is voluntarily made, our Government, of course, will in no way interfere.* But where the transfer is induced, as can be easily established, by duress, we have a right to protect the national of any country against that sort of an imposition, using a very mild term, with respect to securities and other evidences of ownership subject to our laws" (86 Cong. Rec. 5007). (Italics supplied.)

"Mr. Wagner: *The joint resolution does not absolutely prohibit any transaction. It simply contemplates, if an Executive order is issued, that each transaction be scrutinized to determine whether it was bona fide or accomplished through duress.*

"Mr. Barkley: That is right" (86 Cong. Rec., 5175-5176).

In the debate on the amendment of Sec. 5(b) by the First War Powers Act, Congressman Williams summarized the purpose of freezing as follows:

> "It [the 'freezing control'] following immediately the invasion of Norway, Belgium, and Holland by Germany, and it was enacted for the very *purpose of protecting their nationals* and their property in this country from transactions and transfers *forced upon them by the Germans at that time.* That was the purpose of it. There was no intention and there is no intention at all now that it should be applied to any transactions or any property in which an American citizen has an interest." 87 Cong. Rec. 9865 (1941).

[13] Senators Barkley and Wagner in 86 Cong. Rec. 5006.

It is true, of course, that, since Orvis attached after Gen. Ruling 12 in contrast to Zittman who attached months before the Ruling, General Ruling 12 does not apply to *Zittman* and this case does not parallel the *Zittman* cases on the facts. What was overlooked below is the fact that, since the Custodian, however he vests, acquires only the alien interest, Gen. Ruling 12 in reaffirming the validity of the attachment against the alien requires the same result as against its successor, the Custodian.

This Court made it clear that the attachments in *Zittman* were good as against General Ruling 12 not only because that Ruling did not operate retrospectively but also because the Ruling was not intended to nullify attachments. To ascribe to the Ruling a contrary purpose would be "inconsistent and irreconcilable with the contentions made two days after its issuance by both the Treasury and the Department of Justice." 341 U. S. 446, 452-3. To permit the Ruling to be interposed as a bar to the satisfaction of American creditors' claims out of frozen funds "would be complete frustration of a large part of the freezing program." 341 U. S. 446, 457.

As an attempt to deal with the problem of attachment of frozen funds, General Ruling 12 leaves much to be desired in the way of clarity and appreciation of the requisites of a valid attachment. Piercing the Rulings contradictions and ineptnesses,[14] this Court in *Zittman* construed the

[14] In *Zittman* this Court said of General Ruling No. 12 (341 U. S. 446, 452):

> "* * * Whether an administrative agency could thus lump all attachments as prohibited 'transfers' without reference to the nature of the rights acquired or steps taken under the various state laws providing for attachments, presents a question which we need not decide here. * * *"

Since attachment without license was authorized by the Treasury (supra, footnote 4), the Orvis attachment would be enforceable under General Ruling 12, subd. 3, "to the same extent as it would be valid or enforceable but for * * * section 5(b) of the Trading With the Enemy Act" and Exec. Order 8389. Contrast this statement with the

General Ruling so as not to destroy the traditional right of the citizen to satisfy his claim out of enemy property. It was error for the Court below to hold otherwise.

* * * * * *

The Orvis lien was a vested property right in 1943. Congress did nothing before and has done nothing since which authorizes the Custodian to destroy it. Nor could it, constitutionally, have given such authority. *Security-First National Bank* v. *Ridge Land & Nav. Co.*, 85 F. 2d 557, 561. Indeed, there is strong reason to believe that the Custodian, contrary to constitutional dictates, has abused the authority which he actually did get by denying licenses to some American creditors, such as Orvis, when, in similar circumstances, the Government has unhesitatingly granted licenses to other citizens and even to aliens.[15] *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The holding below is an unwarranted departure from the rationale of the *Zittman* cases.

II

Sec. 34 of the Trading With the Enemy Act does not annul attachment liens.

Contrary to the view of the Court of Appeals—Sec. 34 is not analogous to the Bankruptcy Act. The purpose of the Bankruptcy Act is to discharge the honest bankrupt from the burden of his debts. *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 244. Sec. 34 expressly disclaims such a purpose. Sec. 34, as it plainly says, applies only to that creditor who seeks "satisfaction of a **debt** claim" out of vested property. It does not apply to the creditor who chooses to by-pass the Custodian and to proceed directly against the alien

---

proviso of General Ruling 12, subd. 4. Also contrast subd. 4 with the requisites of a valid attachment as laid down in *Pennoyer* v. *Neff*, 95 U. S. 714.

[15] See footnote 8, supra p. 11. See record in *Zittman* cases, pp. 66-69.

debtor. Under Sec. 34(i), such a creditor may bring "any suit at law or in equity"—presumably including attachment actions—against his alien debtor, regardless of whether he could have claimed under Sec. 34. If the creditor chooses to claim under Sec. 34, any distribution received by him is *pro tanto* satisfaction only. He may pursue the alien for the balance. Sec. 34(i).

Bankruptcy affords the creditor his sole remedy. Sec. 34 affords him a remedy in addition to suit. The purposes of the two are contrasting. The former is for the benefit of the debtor and cuts off the creditor's usual remedies against him. The latter is for the benefit of the creditor and preserves to him every remedy which he may have against his debtor "at law or in equity." The bankruptcy trustee succeeds to all of the bankrupt's assets by operation of law. *Bankruptcy Act*, § 70. The Custodian takes only those assets of the alien debtor which he chooses to vest. Sec. 5(b); *Clark* v. *Allen*, 331 U. S. 503, 511.

The Court of Appeals failed to grasp the divergent purposes of the two enactments. Analogizing Sec. 34 to a bankruptcy enactment, it strained to find, in Sec. 34, a purpose to annul attachment liens. It so found because allegedly,

> A. "Sec. 34(g) establishes an order of priority of claims but accords no priority to attachment liens over ordinary claims."
>
> B. The direction in Sec. 34(d) to apply vested property "equitably" to the payment of the alien's debts is inconsistent with the recognition of attachment liens.
>
> C. Since some state laws do not accord a lien to the attaching creditor, the laws of those which do must be stricken down to achieve uniformity.

Not one of these reasons withstands analysis.

A

Sec. 34(g) merely ranks unsecured claims. It does not purport to deal in any way with attachment or other liens.

The Court of Appeals would destroy the Orvis lien because Sec. 34(g) gives no priority to attachment liens. It is true that this section accords no priority to attachment liens. This is not—as thought below—because such liens are to be disregarded. It is because—as Mr. Justice Douglas noted in *Zittman No. 1*—Sec. 34(g) "does not purport to deal with" liens "lawfully acquired in judicial proceedings." 341 U. S. 446, 465n. In fact, it does not deal with any lien interests. Sec. 34(g), as it plainly says, sets up a schedule of priorities for "Debt claims" only.

Lien claims are dealt with by Sec. 34(i). This section gives the lien claimant a choice. He may press his lien under Sec. 9(a) or under Sec. 34 or under both. Whichever course he chooses, Sec. 34(i) makes it clear that his security interest remains inviolate. Having painstakingly protected "security interests" in Secs. 9(a) and 34(i), Congress cannot be said to have intended, by inference, to accomplish precisely the contrary in Sec. 34(g) addressed to "debt claims" only.

The Congressional materials make this clear. The Senate Report on the law which enacted Sec. 34 (Senate Rep. No. 1839, 79th Cong., 2d Sess.) says at page 9:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in sub-sec. [34] (i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition, or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of that interest, in which event his recovery would be reduced as in the case of any other such plaintiff, to the extent of any debt-claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt-claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors."

The House Report is identical. H. Rep. No. 2398, 79th Cong. 2d Sess., p. 15.

The rights of lien claimants are to be found in Secs. 9(a) and 34(i). The Court below erred in seeking them in Sec. 34(g).

B

The direction to the Custodian to make distribution equitably requires him to recognize—not nullify—attachment liens.

Sec. 34(a) provides that the property of an alien debtor, when vested, "shall be *equitably* applied by the Custodian * * * to the payment" of the alien's debts. The Court of Appeals held that equity would not be served by enforcing attachment liens. To hold otherwise, it said, would be to put diligence above equity.

The Orvis attachment lien was acquired in 1943. As we have already shown (supra, pp. 3-5) at that time equity rewarded the diligent. That creditor came first who sued first. To destroy rights validly fixed under the laws of 1943 because of a change made in 1946 is itself abhorrent to equity. This Court will not impute to Sec. 34 "an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start." *Holt* v. *Henley*, 232 U. S. 637, 640 (in which the Court upheld a creditor's lien against a later amendment of the Bankruptcy Act which would have destroyed it).

If, as is claimed, Sec. 34 is grounded on the precepts of equity, that section compels recognition of the Orvis lien. In equity, the Custodian would be bound to yield to an attachment precedent to his vesting. *In re People of the State of N. Y. by Beha*, 253 N. Y. 365; *West Virginia P. & P. Co.* v. *Peoples Home Journal, Inc.*, 233 App. Div. 376; *Ward* v. *Conn. Pipe Mfg. Co.*, 71 Conn. 345; *Buswell* v. *Order of the Iron Hall*, 161 Mass. 224; *Kittredge* v. *Asgood*, 161 Mass. 384.

This is also the sense of Sec. 34(d). Under this subsection, debt claims may be paid only out of "any property or interest owned by the debtor immediately prior to its vesting." This excludes from the fund available to the Custodian for unsecured claims the amount of any precedent attachment lien interest which, as here, is good as against the alien. Under Sec. 34(b), the Custodian must keep intact the funds or property so claimed, pending adjudication of the lien interest under Sec. 9(a). Under Secs. 34(b) and (d), the Custodian—like the alien from whom he takes—is bound by the attachment lien. Sec. 34 merely enacts the rule long followed in equity.

Under Sec. 34, as in proceedings under Sec. 9(a), the interest of the lien claimant is inviolate. Nothing in the purpose of Congress to achieve equality among unsecured *debt* claimants "warrants leveling the good faith *lien* claimant to the unsecured status of the others." (Douglas, J., concurring in *Zittman* v. *McGrath*, 341 U. S. 446, 465.)

C

Uniformity will be served—not offended—by recognizing the Orvis lien.

The Court of Appeals felt that recognition should be denied to the Orvis lien because in some states "attachment does not create a lien" and to recognize such a lien in the others "will result in a lack of uniformity." This misconceives existing federal policy.

The difference in treatment accorded to creditors by the various states is inevitable and logical under our federal system. Uniformity is not properly served by adopting one state rule and rejecting all others. This Court has so held in another area which is also "peculiarly of national concern." Thus, although the Constitution expressly requires (Art. 1, Sec. 8) "uniform laws" on the subject of bankruptcy, the dictate of uniformity is met by the Bankruptcy Act which recognizes and enforces the laws of the

states in respect to priorities, liens etc., "although in these particulars the operation of the act is not alike in all States." *Stellwagon* v. *Clum*, 245 U. S. 605, 613.

The bankruptcy definition of "uniformity" is even more apt here because Sec. 34(i) reserves to the creditor, if he so chooses, the right to resort to the varying state remedies.

* * * * * *

With the whole range of ordinary legal remedies carefully preserved by Sec. 34(i) to the American creditor against his alien debtor, there is no warrant for reading into Sec. 34 a purpose to destroy those remedies.

III

This suit was properly brought under Sec. 9(a).

The Custodian contended below that, because he did not license the Orvis attachment, the Sec. 9(a) remedy is not available to Orvis; Orvis, he says, must proceed only under Sec. 34.[16] Though the Court of Appeals rejected this view, the Custodian reasserts it here. It is without substance.

A

The lien creditor may, at his election, enforce his lien by proceeding under either Sec. 9(a) or Sec. 34 or both.

Sec. 34(i) says:

> "(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt

[16] Respondent's brief in the Court of Appeals, pp. 8, 14.

claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: Provided, That *no person asserting any interest, right or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section;* nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding." (Italics supplied.)

As Sec. 34(i) says, only the debt claimant is limited to the remedies of Sec. 34. The lien claimant, asserting an interest in the vested property, is secure in his right to proceed under Sec. 9(a), "pursuant to this Act for the return thereof." He may pursue his Sec. 9(a) remedy despite "any proceeding which he may have brought pursuant to this section", 34.

The plain words of the statute make the remedies under Sec. 9(a) and Sec. 34 alternative and cumulative. Congress intended precisely this. The Senate Report on the law which enacted Sec. 34 (Senate Rep. No. 1839, 79th Cong., 2d Sess.) says at page 9:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection [34](i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt-claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt-claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors."

The House Report is identical. H. Rep. No. 2398, 79th Cong., 2d Sess., p. 15.

On April 7, 1952 this Court accorded the Sec. 9(a) remedy to innocent stockholders to recover their amorphous interests in the property of a corporation having an enemy taint. The stockholder—if innocent—may sue under Sec. 9(a) though his interest is guilty and has been used to benefit the enemy. *Kaufman* v. *Societe Internationale, etc.*, 72 Sup. Ct. 611. Here both Orvis and its interest were innocent. The Orvis attachment was, in fact, an attack upon the enemy. *Zittman*, 341 U. S. 446, 463. Under *Kaufman*, the instant case is *a fortiori*.

B

The Sec. 9(a) remedy is not limited by, nor subordinated to, the Custodian's licensing power.

The Custodian's view is that Orvis could sue under Sec. 9(a) only if he had licensed the Orvis attachment.[17]

Nothing in Sec. 5(b), or in any other part of the Act, makes the Sec. 9(a) remedy a matter of the Custodian's grace. Anyone who is not an enemy may sue under Sec. 9(a). If he establishes his "interest, right or title" in the vested property, the "court shall order the payment * * * or delivery to said claimant of the money or property so held" by the Custodian "or the interest therein to which the court shall determine said claimant is entitled." Sec. 9(a). "The statute gives an absolute right to the suitor who comes within its terms * * *." *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 301.

If the policy considerations underlying the Custodian's power to license under Sec. 5(b) bear on the claimant's right to judgment, it is for the court to apply them in the Sec. 9(a) suit. "Nothing could be clearer than in a suit so brought the Court is to determine every issue necessary to the establishment of the claim." *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 501. It is for the Court, not the Cus-

[17] Footnote 16, supra p. 20.

todian, to decide whether the judgment will comport with the policy underlying Sec. 5(b).

The Custodian has never disclosed to court or litigant his criteria for granting or withholding a license. He has not done so here. In reality, he insists here that he may, by withholding such criteria from judicial scrutiny, defeat a Sec. 9(a) suit. The Constitutional right—for which Sec. 9(a) supplies the remedy—cannot be defeated by such arbitrary Executive action.

The Custodian is not bound to vest. *Clark* v. *Allen*, 331 U. S. 503, 511. If he chooses to do so, he vests subject to the conditions imposed by the Trading With the Enemy Act which creates the vesting power. One of those conditions is that he must submit to a suit for return under Sec. 9(a) by any non-enemy whose interest has been seized. The duty to submit is imposed by the Act. It is also imposed by the Constitution. If the Custodian were to use his licensing power under Sec. 5(b) to destroy the Sec. 9(a) remedy, the licensing power itself would fall before the Constitution. *Garvan* v. *$20,000 Bonds*, supra, p. 479; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79; *Josephberg* v. *Markham*, 152 F. 2d 644, 649.

In *Markham* v. *Cabell*, 326 U. S. 404, this Court made it clear that the Sec. 5(b) powers cannot be used to nullify the Sec. 9(a) remedy, saying at page 411:

> "* * * The right to sue, explicitly granted by § 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending § 5(b) desired to delete or wholly nullify § 9(a). On the contrary, the normal assumption is that where Congress amends only one section of the law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible * * *."

Later, the Custodian asked Congress to overturn *Markham* v. *Cabell*, to the extent of denying the Sec. 9(a) remedy to friendly foreign nationals. Congress refused stating that Sec. 34 "preserves in full these rights under 9(a) which the friendly foreign national, together with the United States citizen has had for more than 25 years under the act." (Senate Rep. No. 1839, 79th Cong., 2nd Sess., p. 2.)

In order to accept the Custodian's view, this Court must make the impossible finding that Congress, by Section 34, denied to Orvis, an American citizen, the very Sec. 9(a) remedy which, by the same enactment, it resolutely preserved to alien friends.

CONCLUSION

It is respectfully urged that the judgment of the Court of Appeals should be reversed.

JOSEPH M. COHEN,
Attorney for Leo Zittman, Amicus Curiae,
36 West 44th Street,
New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1952

No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, and HERBERT R. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & CO., and JOHN J. McCLOSKEY, JR., as CITY SHERIFF of the CITY OF NEW YORK,

Petitioners,

against

JAMES P. McGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONERS

HENRY I. FILLMAN,
Amicus Curiae.

CITATIONS

Cases:

IN THE

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No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, and HERBERT R. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & CO., and JOHN J. McCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

against

JAMES P. McGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONERS

The undersigned, as counsel for John F. McCarthy, the petitioner in the two cases of *McCarthy* v. *McGrath,* which were decided by this Court together with the companion cases of *Zittman* v. *McGrath,* 341 U. S. 446, 471, respectfully files, with consent of the Solicitor General and petitioners pursuant to Rule 27, paragraph 9(a) of the Rules of this Court, this brief as *amicus curiae,* for the reason that the case at bar, which involves the interpretation of the opinions in those cases, may affect McCarthy's rights under his attachment liens on the property *res* vested and taken over by the Alien Property Custodian.

Question Presented

Whether the lien obtained in 1943 by the levy of an attachment warrant in a New York Supreme Court action by United States citizens against a Japanese national on the latter's blocked property, subsequently *res* vested and taken over by the Custodian,[1] is an "interest, right, or title" in the vested property which may be recovered by the attachment creditors by a suit under Sec. 9(a) of the Trading With the Enemy Act.

Statement

In the first *Zittman* and *McCarthy* cases, 341 U. S. 446, this Court held that New York warrants of attachment levied on blocked accounts of German nationals, whose "right, title, and interest" therein the Custodian subsequently sought to vest, created a valid lien thereon under New York law and that if the Custodian takes over the blocked accounts under a *res* vesting, all

> "questions as to recognition by the Custodian of the state law lien, or priority of payment, are reserved for decision if and when presented in accordance with the Act" (p. 464).

In the second *Zittman* and *McCarthy* cases, 341 U. S. 471, this Court held that the Custodian was entitled to take possession of blocked accounts of German nationals which had been attached under New York law, but that the transfer of possession to the Custodian

> "does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration",

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[1] "Custodian" refers throughout to either the Alien Property Custodian or his successor, the Attorney General.

and that (p. 474) the

> "consequences, if any, that flow from the substitution of the Custodian in place of the bank as holder of the funds, upon rights derived from *valid state court judgments secured by attachment, are not ripe for determination*",

because they

> "may never come into controversy"

and, therefore, all

> "questions as to the petitioners' claims, judgments or priorities are reserved for decision in the proceedings prescribed by statute." (Italics supplied.)

The distinction between the *Zittman* and *McCarthy* cases and the case at bar is that there the attachments were levied before the issuance of General Ruling No. 12 (7 F. R. 2991) under Executive Order No. 8389, whereas here the attachment was levied on the blocked accounts of the Japanese national after the General Ruling was issued. However, as indicated by this Court in the first *Zittman* and *McCarthy* cases (341 U. S. at p. 458),

> "consistent administrative practice treated"

the levy of attachments upon blocked property

> "as permissible and valid"

and, therefore, the validity of the lien obtained by the levy of the attachment here involved is not affected by the General Ruling.

ARGUMENT

I

Since the levy of the attachment created a valid lien on the property subsequently taken over by the Custodian, Orvis Brothers & Co., as provided by Sec 34(i) of the Trading With the Enemy Act, have an "interest, right, or title" which may be recovered by suit under Sec. 9(a) of the Act.

In view of the decisions of this Court in the *Zittman* and *McCarthy* cases, *supra*, the attachment levy involved here is valid under New York law and, therefore, it created a lien on the attached property subsequently taken over by the Custodian.

In *Matter of People* (First Russian Ins. Co.), 253 N. Y. 365, 368, Chief Justice Cardozo said:

> "The claimant, the attaching creditor, is not asserting a claim to participate in the fund as a beneficiary of a trust, a member of the class or group for whom administration was assumed. The claim which it asserts is not in subordination to the trust, but in priority and even, in a sense, in hostility thereto. The lien of its attachment has put it in the same position as if it were the holder of a mortgage or of an equitable lien, the product of agreement. A receiver or other officer taking such a fund into his custody, must take it as he finds it, with all its imperfections on its head. One of those imperfections for this receivership was a lien created as security, not for principal alone, but for principal and interest. The fund is not free until the lien has been discharged" (citing cases).

In *West Virginia Pulp & Paper Co.* v. *People's Home Journal, Inc.*, 233 App. Div. (N. Y.) 376, the Court said, at page 379, that

> "a valid lien once acquired by an attaching creditor cannot be set aside and the creditor deprived of its rights in the property upon which the lien attaches."

As stated by Mr. Justice Bradley in *The Lottawanna*, 21 Wall. 558, 579, and by Mr. Justice Gray in *The J. E. Rumbell*, 148 U. S. 1, 11,

> "a lien is a right of property, and not a mere matter of procedure."

In *Haebler* v. *Myers*, 132 N. Y. 363, 368, the Court said that

> "A lien is property in the broad sense of that word, * * *."

Manifestly, the attachment lienor here is not a simple "debt" claimant.

The Trading With the Enemy Act makes a distinction between obligations in simple debt (Sec. 34) and those constituting a right in property, such as a lien (Sec. 9(a)). Sec. 34 gives the Custodian authority to pay "debt claims" asserted by creditors of the former owners of the seized property. It provides, however, in subdivision (i)

> "that no person asserting any interest, right, or title in any property * * * acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest be deemed to have been waived solely by reason of such proceeding."

Referring to subdivision (i) in his analysis of the bill which became Sec. 34, submitted in the form of a letter dated February 1, 1946, to the Chairman of the House Committee of the Judiciary (*Hearings before Subcommittee No. 1 of the Committee of the Judiciary, House of Representatives, 79th Cong., 2d Sess. on H. R. 5089*, p. 17), the then Custodian, James E. Markham, said:

> "Subsection (i), at line 18 on page 12, is generally procedural in nature. * * * *Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso on page* 13. Such a claimant may proceed as a general creditor, without waiving his security. Or *he may elect not to participate in a debt-claim distribution but to file a claim or suit as a title claimant for return of his claimed interest in the property* or for just compensation, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt-claim payment made to him (or to any other person, if *his claim as a title claimant* was not filed in time to hold up debt-claim payments)." (Italics supplied.)

In enacting the bill the Congress adopted the Custodian's position that a creditor claiming a lien may recover his security interest in the seized property by suit, for both the Senate and House Reports on the bill (Senate Rep. No. 1839, 79th Cong., 2d Sess., p. 9; House Rep. No. 2398, 79th Cong., 2d Sess., p. 15) state:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection (34) (i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition or alternatively, *he may file a claim or suit as a title claimant for return of his security interest in the property* or for just compensation in

respect of that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt-claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt-claim payments). *It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors.*" (Italics supplied.)

Sec. 9(a) of the Act permits a person who is not an enemy, or the ally of an enemy, claiming any "interest, right, or title" in property seized by the Custodian to sue in equity to establish his "interest, right, or title" and to compel its return in the event of the Custodian's denial of a claim for the return thereof.

The attachment lien in this case is a security interest in the property in the Custodian's possession, and this security interest takes the claim of Orvis Brothers & Co. which it secures out of the category of an unsecured or simple debt claim. It is an "interest, right, or title" in the seized property within the meaning of Sec. 9(a), and may be recovered by suit under that section.

Furthermore, the Custodian will not deny that in administering seized alien property he has regarded and treated a claimant asserting a lien on frozen property subsequently *res* vested as presenting a claim of an "interest" in the property, and has deemed himself under a duty to return the "interest" claimed. Surely, his duty is no less when the return of the lienors' "interest" is sought by a Sec. 9(a) suit.

II

In practice, the Custodian has recognized and granted a priority to a New York attachment lien on blocked Japanese assets obtained without specific license therefor by payment of the judgment secured thereby, notwithstanding, that the assets of the Japanese debtor being administered by the Custodian are insufficient to pay the filed claims of all its American creditors.

In *Murray Oil Products Co., Inc.* v. *Mitsui & Co., Ltd.*, 55 F. Supp. 353 (S. D. N. Y.), aff'd 146 F. (2d) 381 (C. C. A. 2), a warrant of attachment was issued on December 22, 1941 by the Supreme Court, State of New York, County of New York. Without a specific Treasury license, the Sheriff levied thereunder on the bank balances of Mitsui & Co., Ltd., a Japanese national, with the National City Bank and Chase National Bank in New York City, which had been frozen on June 14, 1941 by Executive Order No. 8832 (6 F. R. 3715) under Executive Order No. 8389. Thereafter, in August 1942, the Custodian vested the attached bank accounts. After removal of the action to the Federal Southern District Court, the plaintiff recovered a judgment in May, 1944, which was affirmed by the Court of Appeals for the Second Circuit in December, 1944. After affirmance, the Custodian recognized the priority of the attachment lien and the validity of the judgment which it secured by paying the judgment creditor in full the amount of the judgment, together with the Sheriff's poundage fees (Appendix, *infra*, pp. 10-14).

But, the assets of Mitsui & Co., Ltd. taken over by the Custodian for administration under the Act are insufficient to pay the filed claims of all its American creditors, for the Custodian in the *Annual Report—Office of Alien Property, Department of Justice, for the Fiscal*

Year ended June 30, 1950, in reporting on the insolvent accounts being administered by him, states, at page 76 thereof, that:

> "During the past fiscal year initial processing was completed in respect of the * * * claims filed against the insolvent accounts of * * * Mitsui and Co., Ltd."

Although this Annual Report does not list the assets of and claims against Mitsui & Co., Ltd., the Custodian's office has informally advised the undersigned that Mitsui's assets in his hands amount to approximately $5,000,000, the filed claims total approximately $28,000,000, and that the claims of general creditors are not likely to be paid in full.

Since the attachment lien of Murray Oil Products Co., Ltd. was given recognition as a priority and its judgment paid in full, Orvis Brothers & Co. is entitled to receive the same treatment from the Custodian, even though the attachment lien was created after General Ruling No. 12 was issued, and by reason of the Custodian's refusal to satisfy its judgment in full, Orvis Brothers & Co. may recover under Sec. 9(a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and that of the District Court reinstated.

January 16, 1953.

HENRY I. FILLMAN,
Amicus Curiae.

Appendix

1. Order, stipulation and letter re *Murray Oil Products Co. Inc. v. Mitsui & Co. Ltd.*

At a Term of the United States District Court of the Southern District of New York, held in and for the said District, at the Federal Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 21st day of February, 1945.

Present: HONORABLE SAMUEL MANDELBAUM, U. S. D. J.

C-18-459

MURRAY OIL PRODUCTS CO., INC.,

Plaintiff,

against

MITSUI & CO., LTD.,

Defendant.

Upon the annexed stipulation and the annexed consent, it is hereby

ORDERED that:

1. Upon the payment of the sum of $23,241.54 to the plaintiff and its attorney and the sum of $407.42 to the Sheriff of the City of New York as provided in the annexed stipulation, the warrant of attachment granted herein, on or about December 22, 1941, by the Supreme Court, New York County, wherein this action at that time was pending, be, and the same hereby is, satisfied, discharged and released.

2. The attachment and undertaking, given by the plaintiff, to wit, undertaking of the Fidelity & Deposit Company of Maryland, dated December 20, 1943, in the sum of $2,250 be, and the same hereby is, discharged.

SAMUEL MANDELBAUM (sgd.)
U. S. D. J.

.....

A True Copy

O.K. GEORGE J. H. FOLLMER (sgd.)
P.M. Clerk

(SEAL)

The foregoing is hereby consented to.

COPAL MINTZ (sgd.)
Attorney for Plaintiff.

JOHN F. X. McGOHEY (sgd.)
United States Attorney as attorney for Alien Property Custodian.

PUTNEY, TWOMBLY, HALL & SKIDMORE (sgd.)
Attorneys for Defendant.

Appendix

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MURRAY OIL PRODUCTS CO., INC.,

Plaintiff,

against

MITSUI & CO., LTD.,

Defendant.

Stipulation

IT IS HEREBY STIPULATED that:

1. There be paid, out of the attached funds on deposit with the National City Bank, in discharge and satisfaction of the attachment and the judgment herein: (1) to the plaintiff and Copal Mintz, its attorney, the sum of $23,241.54, made up as follows: $22,104.27, the amount of the judgment entered May 5, 1944, plus $1,062.82 interest thereon (calculated to February 23, 1945), plus $36.45 costs as taxed by the Clerk of the Circuit Court of Appeals; (2) to the Sheriff of the City of New York the sum of $407.42 in full for his fees and charges.

2. Upon delivery of the foregoing payments there shall be delivered to the defendant's attorneys and to the Alien Property Custodian at the latter's office at 120 Broadway, Borough of Manhattan, City of New York, satisfactions of the aforementioned judgments.

3. An order shall be entered herein satisfying, discharging and releasing the warrant of attachment herein

upon the making of the payments hereinabove provided and discharging the attachment bond which plaintiff filed at the time of the issuance of the warrant of attachment.

Dated: New York, February 20, 1945.

COPAL MINTZ (sgd.)
Attorney for Plaintiff.

JOHN F. X. MCGOHEY (sgd.)
United States Attorney as attorney for
Alien Property Custodian.

PUTNEY, TWOMBLY, HALL & SKIDMORE (sgd.)
Attorneys for Defendant.

(L E T T E R)

General Counsel

120 Broadway

In replying, please
refer to MSM:COL:amo

February 23, 1945

National City Bank of New York
55 Wall Street
New York, New York

Re: Murray Oil Products Company, Inc. v.
Mitsui & Company, Ltd.

Dear Sirs:

Reference is made to my letter to you, dated February 6, 1945, and your reply under date of February 14, 1945, in which you request specific instructions with respect to the payment of the judgment and sheriff's fees in the above entitled action.

By agreement with the attorney for the plaintiff in the said action and with the sheriff's office, two checks have been drawn on the account in your bank entitled, "Alien Property Custodian, case of Mitsui & Company, Ltd. impounded account", signed by Mr. Stanley B. Reid, and countersigned by Mr. L. M. Reed, the Custodian's duly authorized supervisor. One check is made payable to Murray Oil Products Company, Inc. and Copal Mintz, attorney, in the amount of $23,241.54, representing the principal amount of said judgment $22,142.27, and interest thereon at the rate of 6% from May 6, 1944 to February 3, 1945 in the amount of $1,092.34, and Circuit Court of Appeals taxed costs in the amount of $36.45. The second check is made payable to the Sheriff of the City of New York in the amount of $407.42, representing full payment of the sheriff's fees at the statutory rate in connection with the judgment.

The attachment heretofore issued against the account in your bank has been vacated by court order, and a certified copy of said order and satisfactions of the judgments herein has been delivered to this office.

Very truly yours,

JAMES E. MARKHAM,
Alien Property Custodian.

No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1952.

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, AND HERBERT R. JOHNSON, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ORVIS BROTHERS & CO., AND JOHN J. MCCLOSKEY, JR., AS CITY SHERIFF OF THE CITY OF NEW YORK, PETITIONERS

v.

JAMES P. MCGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, AND HERBERT R. JOHNSON, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ORVIS BROTHERS & CO., AND JOHN J. MCCLOSKEY, JR., AS CITY SHERIFF OF THE CITY OF NEW YORK, PETITIONERS

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the District Court (R. 66) is not reported. The opinion of the Court of Appeals (R. 76) is reported at 198 Fed. 2d. 708.

JURISDICTION

The judgment of the Court of Appeals (R. 80) was entered on June 30, 1952. A petition for rehearing filed on July 14, 1952 (R. 81) was denied on July 29, 1952 (R. 88). Petition for writ of certiorari was filed on October 21, 1952. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a creditor who had levied an attachment, not licensed under Executive Order No. 8389, as amended, on blocked property of his enemy debtor, which is later *res* vested and transferred to the possession of the Alien Property Custodian, may recover, by suit under Section 9 (a) of the Act an "interest, right, or title", in the property.

STATUTES, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent statutory provisions and orders and regulations issued thereunder are set forth in the Appendix, *infra* (pp. 16–30).

STATEMENT

The facts are not in dispute. Petitioners (except the Sheriff) are New York security and commodities brokers known as Orvis Brothers & Co. In 1934 they opened a margin account in favor of Takenosuke Itoh, which was guaranteed by C. Itoh & Co., Ltd., later succeeded by Sanko Kabu-

siki Kaisya, ("Sanko"). All three were Japanese nationals (R. 34–36). This account was closed out in March, 1938, at which time the customer was indebted to Orvis in the amount of $43,341.37. Before the outbreak of war this indebtedness had been reduced to approximately $19,796.85 (R. 35–36). In June, 1943, Orvis commenced an action on the debt in the Supreme Court of New York, New York County, and on December 3, 1943, secured judgment for $20,714.84 against Sanko (R. 36, 37). On June 28, 1943, Orvis had caused a warrant of attachment to be levied on a debt owing to Sanko by Anderson, Clayton & Co. (R. 36). Orvis and the Sheriff also commenced an action in aid of attachment against Anderson, Clayton & Co., and on October 28, 1946, secured a judgment of $5,136.09 conditioned on plaintiff's securing a license under Executive Order No. 8389. Thereafter, a larger indebtedness from Anderson, Clayton & Co. to Sanko was discovered and on February 20, 1948, the judgment was amended *nunc pro tunc* to provide that Orvis should recover of Anderson, Clayton & Co. the sum of $29,633.24 to be applied in satisfaction of the judgment against Sanko and fees, costs, and disbursements (R. 37–39).

At the time of the levy of attachment, the property of Sanko was blocked under Executive Order No. 8389, as amended. Petitioners did not apply for or obtain a license authorizing the attachment. Petitioners did apply, on or about November 20,

1946, for a license to permit Anderson, Clayton & Co. to pay the funds in its possession to the Sheriff, and this was denied on February 15, 1947 (R. 21, 37).

The funds in question were vested under the Trading with the Enemy Act as enemy-owned property by *res* vesting orders issued on June 27, 1947, and November 25, 1947, and the Alien Property Custodian secured possession of the funds (R. 37–38, 43–44). Before the vesting orders had been issued, however, petitioners filed a notice of claim with the Custodian. This was treated by the Custodian as another application for a retroactive license and such a license was denied. (R. 24.)

In 1949 the Claims Branch of the Office of Alien Property moved to dismiss petitioners' notice of claim insofar as it was a claim for the return of a property interest in the vested property. To this extent the claim was dismissed by the Hearing Examiner and his action upheld by the Director of the Office of Alien Property. (R. 24–25.) To the extent that the claim seeks payment of a debt under Section 34 of the Act, it is still pending.

Prior to this dismissal, *pro tanto*, of petitioners' administrative claim, petitioners brought this action on April 28, 1949 (see R. 11), under Section 9 (a) of the Trading with the Enemy Act, seeking a decree declaring that they have a lien on the vested property superior to the

rights of the defendant, that the defendant holds the property subject to their lien, and that the orders *res* vesting the property in question were valid and effective only to the extent of any surplus that might remain after the property had been first applied to the satisfaction of petitioners' claim, and requiring defendant to ~~pay~~ to the Sheriff such part of $29,633.24 as is necessary to satisfy plaintiffs' judgment, with interest and costs (R. 27).

Respondent moved for judgment on the pleadings and petitioners cross-moved for summary judgment (R. 31, 32). The District Court denied respondent's motion and granted petitioner's motion on the authority of *Zittman* v. *McGrath,* 341 U. S. 466 (R. 66).

The Court of Appeals reversed (R. 80) holding that the defendant was entitled to hold the vested assets for administration under Section 34 of the Act and that petitioners had no "interest, right or title" in the property which they could recover from the defendant in a suit under Section 9 (a) (R. 76–79).

ARGUMENT

This case presents the question, which this Court left open in the two cases of *Zittman* v. *McGrath,* 341 U. S. 446, and 341 U. S. 471, whether a creditor of an enemy debtor whose property has been *res* vested pursuant to the Trading with the Enemy Act, is entitled to any lien or other right of priority by reason of an

unlicensed attachment obtained after the effective date of the freezing order. Here the Custodian, "exercising the paramount power of the United States" *res* vested the debtor's property and thereby "[took] over the entire fund for administration under the Act" (341 U. S. at 464). He thus followed the same procedure as in the second *Zittman* case, in which this Court expressly reserved "for decision in the proceedings prescribed by statute" "all questions as to the petitioners' claims, judgments, or priorities" (341 U. S. at 474).

The present petitioners, by suit under Section 9 (a) of the Act, seek to recover interests founded upon unlicensed attachments as property interests to which they are entitled absolutely, without regard to, and in advance of any disposition of claims of other creditors under Section 34 of the Act. We believe the court below rightly denied such relief. In the first place, this Court in the second *Zittman* case indicated that the appropriate remedy for an unlicensed attachment creditor was Section 34 of the Act, a remedy which petitioners did not here invoke. In the second place, if these petitioners are entitled to proceed under Section 9, the court below correctly held that their unlicensed attachments gave them no such interest as could be recovered under that section. Finally, we point out that the question here presented may no longer be of such importance as to require review by this Court.

1. In the second *Zittman* case, 341 U. S. 471, this Court indicated that the section of the Act under which the unlicensed attaching creditor should assert his rights was Section 34. The Court said (341 U. S. at 473–474):

> While the statute under which the funds are to be "held, administered and accounted for" authorizes the vesting of such foreign-owned property in the Custodian and its administration "in the interest of and for the benefit of the United States,"[2] it is not a confiscation measure but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds "shall be equitably applied" for the payment of debts.[3] If the Custodian disallows a claim, or if he disallows a claim of priority where claims exceed assets, the claimant may seek relief in the United States District Court for the District of Columbia.[4] The transfer of possession of these funds does not purpose to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration.
>
> In view of these facts, we decide, and decide only, that the Custodian has power to possess himself of these funds and to ad-

[2] Trading With the Enemy Act of 1917, 40 Stat. 411, as amended, § 5 (b) (1), 55 Stat. 839.

[3] § 34 (a), 60 Stat. 925.

[4] *Id.* § 34 (e), (f).

minister them. To hold otherwise would be incompatible with the federal program. The consequences, if any, that flow from the substitution of the Custodian in place of the Bank as holder of the funds, upon rights derived from valid state court judgments secured by attachment, are not ripe for determination. They may never come into controversy. All questions as to the petitioners' claims, judgments, or priorities are reserved for decision in the proceedings prescribed by statute.

2. Assuming, however, that petitioners may appropriately assert their claim to priority by suit under Section 9 (a), we believe that the court below correctly held that they do not have a lien or a right to priority good as against the United States, however valid it might be against their private debtor.

The same statute under which the funds in question were vested also authorized their "freezing". Executive Order No. 8389, effective as to Japan on June 14, 1941, 6 F. R. 3715, prohibited, *inter alia*:

> E. All *transfers*, withdrawals, or exportations of, *or dealings in*, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and
>
> F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions. [Italics added.]

Under this order, the Treasury Department issued on April 21, 1942, prior to the attachments in this case, General Ruling 12 (7 F. R. 2991), which declared that any unlicensed transfer of property in a blocked account after the effective date of the Executive Order was null and void, and defined "transfer" to include the issuance or levy of any attachment. Paragraph 4 of the General Ruling added that no attachment could confer a greater interest in property "than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license," although it would be valid *for the parties* for the purpose of determining the rights or liabilities litigated.

Thus the freezing regulations unequivocally prohibited the creation, by unlicensed attachment, of any interest which would be valid *as against the government.*[1] By those regulations the United States, acting in time of emergency leading to war, sought to maintain assets subject to them in *status quo* until the national policy with respect

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[1] This Court's decision in the first *Zittman* case is not to the contrary. This Court regarded the Custodian in that case as asking a declaration that as between private parties the attachments were invalid. 341 U. S. at 463–464. And it expressly reserved for later decision "all federal questions as to recognition by the Custodian of the state law lien, or priority of payment" in the event the Custodian should *res* vest the accounts. 341 U. S. at 464.

In this very context of enemy property this Court said in cases arising under the Confiscation Act of 1862, that trans-

thereto should ultimately be determined by the Congress and the Executive.

The freezing controls were regarded by Congress "as a system which can prevent transactions in foreign property prejudicial to the best interests of the United States." H. Rep. 1507, 77th Cong., 1st sess., p. 3. As such they were intended not merely to prevent the enemy from obtaining any benefit from the frozen assets, but also "to preserve the property * * * for the benefit of Americans who may have claims" (Senator Barkley, 86 Cong. Rec. 5006 (1940)). As this Court stated in *Propper* v. *Clark*, 337 U. S. 472, 484:

> The freezing order of June 14, 1941, immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license, until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected.

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fers *pendente bello* of enemy property were subject to be set aside or disregarded when the United States decided to exercise its sovereign power of seizure. Accordingly it read "null and void" in that Act as meaning void against the United States, though the transfers might be good as between the parties, *Corbett* v. *Nutt*, 10 Wall. 464, 478; *Conrad* v. *Waples*, 96 U. S. 279, 287. The same has been said under the Trading with the Enemy Act, *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C. A. D. C.).

The Treasury Department, which was charged with the primary responsibility for administering the Order, understood that a purpose of the Order was to hold the funds "as is" for subsequent disposition and so advised Congress. Mr. Luxford, Assistant General Counsel for Foreign Funds Control, testified in 1944: "We are holding the assets until this Government might decide as to what it wants to do with them; the Government is the one to make the decision as to what the funds will be used for. And if the Government decides it wants to use the funds for reparations or to pay American creditors the funds will be available". Hearings, Subcommittee No. 1 of House Committee on the Judiciary, 78th Cong., 2d Sess., on H. R. 4840, June 9, 13, 14 and 15, 1944, pp. 98–99. See also the statement of the aims of the "freezing" program set out in *Zittman* v. *McGrath*, 341 U. S. 446, 453–454. In fact the policy of the United States with respect to the disposition of enemy property and American creditors' claims thereto was not determined until some years after our entry into the war. In 1946 Section 34 was added to the Act. That section provided for the equitable and ratable distribution of vested property among creditors. Thereafter in the War Claims Act of 1948 (62 Stat. 1240) Congress provided that vested German and Japanese property should not be returned to its former owners (Section 12)

and that the proceeds of such property remaining after administration under the Trading With the Enemy Act should be covered into a War Claims Fund (Section 12, 13 (a)) to be used to provide compensation to American victims of Axis aggression (Sections 4–8).

To permit the acquisition by unlicensed attachments of indefeasible rights in enemy property would *pro tanto* impair its subsequent availability for disposition in accordance with the Act. If an unlicensed attachment, whether or not it is classed as a "transfer" within the Executive Order, is held to give the attaching creditors as "interest, right or title" assertible under Section 9 (a), then that creditor has the power to hold up the administration of the fund and to prevent payment to all other creditors whether entitled to priority or not, until his suit under Section 9 (a) has been finally decided.

In adopting Section 34, Congress recognized that under Section 9 (a) as it then existed "the rule of 'first come, first served' will apply, resulting in a race of diligence among creditors, exhaustion of many properties without an opportunity to make equitable distribution (many of the properties being insolvent), and interference with the authority, conferred by the First War Powers Act, 1941, to use the property in the interest of the United States". H. Rep. No. 2398, 79th Cong., 2d sess., pp. 9–10; S. Rep. No. 1839,

79th Cong., 2d sess., p. 3.[2] Section 34 was designed to prevent such a race of diligence. *Ibid.*

Notwithstanding the facts that Congress and the Executive sought by freezing to immobilize the property pending later determination as to its ultimate disposition, and that Congress thereafter determined that enemy property should be applied among creditors, not on a first-come, first-served basis, but equitably, petitioners here contend that by unlicensed attachments they acquired a right to payment of their creditors' claims in full without regard to the claims of other creditors. They found that claim, not on some security interest given them by the enemy debtor at the time the debt was created, but solely on their own diligence in pursuing, after the effective date of the freezing order, the remedies available in New York to a general creditor. We believe the court below was entirely correct in holding that to permit recognition of such an interest in a suit under Section 9 (a) would defeat the purposes of the federal freezing and vesting programs.[3]

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[2] See *United States* v. *Securities Corporation General*, 4 F. 2d 619, 622 (C. A. D. C.) affirmed *sub nom. White* v. *Mechanics Securities Corp.*, 269 U. S. 283.

[3] In decisions prior to the *Zittman cases*, the district courts uniformly held that a claimant whose "interest" depended upon an unlicensed transfer might not recover under Section 9 (a). *Heyden Chemical Corp.* v. *Clark*, 85 F. Supp. 949 (S. D. N. Y.); *Blank* v. *Clark*, 79 F. Supp. 373 (E. D. Pa.); *Okihara* v. *Clark*, 71 F. Supp. 319 (D. Hawaii).

3. For the foregoing reasons we believe that the result reached by the court below is correct. There is no conflict with decision of this or any other court. The holding in the instant case affects only unlicensed attachment creditors of enemies whose property has been or may be vested. While the records of the Office of Alien Property (Annual Report, June 30, 1950, p. 67) show that approximately 60,000 claims against vested property seeking payment of some $750,000,000 have been filed, a search of the records discloses only 13 claims involved $328,500 filed by persons claiming an unlicensed attachment lien. Filing of such a claim is a condition precedent to the beginning of a suit under Section 9 (a). Of these 13 claims only the instant case and one other are involved in pending litigation. Over $200,000 of the total claims involved are accounted for by this case and the claims in the *Zittman* cases. All of the attachments involved were obtained in New York, and all the litigation now pending is pending within the Second Circuit. Accordingly, this Court may feel that the issue is not now of sufficient importance and general application to call for the issuance of the writ.

CONCLUSION

The issue of law presented is not in conflict with the decisions of this Court and does not call for resolution by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General,
ROWLAND F. KIRKS,
Assistant Attorney General,
JAMES D. HILL,
GEORGE B. SEARLS,
WESTLEY W. SILVIAN,
Attorneys,
Department of Justice.

DECEMBER 1952.

APPENDIX

1. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq:*

* * * * * *

SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839] * * *.

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 9. (a) [as amended by the Act of March 4, 1923, 42 Stat. 1511] That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and

containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then

such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 34. (a) [as added by the Act of August 8, 1946, 60 Stat. 925] Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1–6 of the Criminal Code (18 U. S. C. 1–6), title I of the Act of

June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I; Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims

in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment ~~of a debt~~ claim be made out of any property or interest or proceeds in respect of which a suit of proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses

of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian.

The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the

Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2)

claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided*, That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this

Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * * * *

2. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emer-

gency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

* * * * *

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

3. General Ruling No. 12, April 21, 1942, 7 F. R. 2991:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however*, That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing

shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order; or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power: *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

* * * * *

4. Assets of and claims against Sanko Kabusiki Kaisya (formerly C. Itoh & Co., Ltd.) received by and filed with the Office of Alien Property:

a. Assets (Account No. 39-21639)—$36,236.02.

b. Claims—$192,371.38 identified by the following Notice of Claim numbers:

1307—$528.25 claimed by James E. Fox & Co. as reimbursement for payment of custom duties.

2022—$20,714.84 claimed by Orvis Bros. for margins in connection with cotton futures.

4044—$6,717.22 claimed by Jenks Gwynne & Co. for margins in connection with cotton futures.

8723—$26,499.01 claimed by Bond, McEnany & Co. as liability on loan account covering cotton transactions.

18940—$136,546.96 and Yen 100,056.11 claimed by Yokohama Specie Bank for liabilities on bills of exchange.

33489—$415.51 claimed by Hunt, Hill & Betts for fees for legal services.

33853—$174.37 claimed by John J. McCloskey for poundage fee.

34646—$648.95 claimed by National City Bank for liabilities for bills of exchange.

39371—$126,27 claimed by Attorney General for collection expenses.

U. S. GOVERNMENT PRINTING OFFICE: 1952

No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1952

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, AND HERBERT R. JOHNSON, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ORVIS BROTHERS & CO., AND JOHN J. McCLOSKEY, JR., AS CITY SHERIFF OF THE CITY OF NEW YORK, PETITIONERS

v.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the District Court (R. 45) is not reported. The opinion of the Court of Appeals (R. 49) is reported at 198 F. 2d 708.

JURISDICTION

The judgment of the Court of Appeals (R. 53) was entered on June 30, 1952. A petition for rehearing filed on July 14, 1952 (R. 54) was denied on July 29, 1952 (R. 55). The petition for a writ of certiorari was filed on October 21, 1952 and was granted on December 15, 1952 (R. 57). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a creditor who had levied an attachment, not licensed under Executive Order No. 8389, as amended, on blocked property of his enemy debtor, which is later *res* vested and transferred to the possession of the Alien Property Custodian, may recover, by suit under Section 9 (a) of the Act, an "interest, right, or title" in the property.

STATUTES, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent statutory provisions and orders and regulations issued thereunder are set forth in the Appendix, *infra* (pp. 49–65).

STATEMENT

The facts are not in dispute. Petitioners (except the Sheriff) are New York security and commodities brokers known as Oryis Brothers & Co. (Orvis). In 1934 they opened a margin account in favor of Takenosuke Itoh, which was guaranteed by C. Itoh & Co., Ltd., later succeeded by Sanko

Kabusiki Kaisya, ("Sanko"). All three were Japanese nationals (R. 22–23). This account was closed out in March, 1938, at which time the customer was indebted to Orvis in the amount of $43,341.37. Before the outbreak of war this indebtedness had been reduced to approximately $19,796.85 (R. 23). In June, 1943, Orvis commenced an action on the debt in the Supreme Court of New York, New York County, and on December 3, 1943, secured judgment for $20,714.84 against Sanko (R. 23, 24). On June 28, 1943, Orvis had caused a warrant of attachment to be levied on a debt owing to Sanko by Anderson, Clayton & Co. (R. 24). Orvis and the Sheriff also commenced an action in aid of attachment against Anderson, Clayton & Co., and on October 28, 1946, secured a judgment of $5,136.09, conditioned on plaintiffs' securing a license under Executive Order No. 8389 (R. 14, 24). Thereafter, a larger indebtedness from Anderson, Clayton & Co. to Sanko was discovered and on February 20, 1948, the judgment was amended *nunc pro tunc* to provide that Orvis should recover of Anderson, Clayton & Co. the sum of $29,633.24 to be applied in satisfaction of the judgment against Sanko and fees, costs, and disbursements (R. 25–26).

At the time of the levy of attachment, the property of Sanko was blocked under Executive Order No. 8389, as amended. Petitioners did not apply for or obtain a license authorizing the attachment. Petitioners did apply, on or about November 20,

1946, for a Treasury license to permit Anderson, Clayton & Co. to pay the funds in its possession to the Sheriff, and this was denied on February 15, 1947 (R. 14, 24).

The Sanko funds in the hands of Anderson, Clayton & Co. were vested under the Trading with the Enemy Act as enemy-owned property by *res* vesting orders issued on June 27, 1947, and November 25, 1947, and the Alien Property Custodian secured possession of the funds (R. 14–15, 25). Before the vesting orders had been issued, however, petitioners filed a notice of claim with the Custodian. This was treated by the Custodian as including another application for a retroactive license and such a license was denied (R. 16).

In 1949 the Claims Branch of the Office of Alien Property moved to dismiss petitioners' notice of claim insofar as it was a claim for the return of a property interest in the vested property. To this extent the claim was dismissed by the Hearing Examiner, and his action was upheld by the Director of the Office of Alien Property (R. 16–17). To the extent that the claim seeks payment of a debt under Section 34 of the Act, it is still pending.

Prior to this dismissal, *pro tanto*, of petitioners' administrative claim, petitioners brought this action on April 28, 1949 (see R. 1), under Section 9 (a) of the Trading with the Enemy Act, seeking a decree declaring that they have a lien on the

vested property superior to the rights of the respondent, that the respondent holds the property subject to their lien, and that the orders *res* vesting the property in question were valid and effective only to the extent of any surplus that might remain after the property had been first applied to the satisfaction of petitioners' claim, and requiring respondent to pay to the Sheriff such part of $29,633.24 as is necessary to satisfy petitioners' judgment, with interest and costs (R. 18–19).

After answering, respondent moved for judgment on the pleadings and petitioners cross-moved for summary judgment (R. 21, 22). The District Court denied respondent's motion and granted petitioner's motion on the authority of *Zittman* v. *McGrath*, 341 U. S. 446 (R. 45).[1]

The Court of Appeals reversed (R. 53), holding that the respondent was entitled to hold the

[1] The District Court awarded the petitioners interest on the judgment of the New York Supreme Court of December 3, 1943, against Sanko. We contended below that this was error (a) because, after freezing and prior to vesting, payment of the debt by Sanko was impossible in the absence of a Treasury license and hence no liability for interest could arise, *Todeva* v. *Oliver Mining Co.*, 232 Minn. 422, 432–433, 45 N. W. 2d 782, 790, and (b) because upon vesting the money became property of, and the debt the debt of, the United States and Congress has not consented to liability for interest. The Court of Appeals did not reach that question, since it denied recovery altogether. In the event this Court should hold petitioners entitled to recover in this action, we suggest that the question of allowability of interest may appropriately be considered by the Court of Appeals on remand.

vested assets for administration under Section 34 of the Act and that petitioners had no "interest, right, or title" in the property which they could recover from the respondent in a suit under Section 9 (a) (R. 49–52).

ARGUMENT

INTRODUCTION AND SUMMARY

The issue here is one of creditors' rights and remedies against enemy property vested by the Alien Property Custodian. Petitioners' claim rests on unlicensed post-freezing attachments like those involved in the two cases of *Zittman* v. *McGrath*, 341 U. S. 446, and 341 U. S. 471. In those cases, this Court decided that as between private debtor and creditor, the attachments created a valid lien securing the debt. But it said that "of course, as against the custodian, exercising the paramount power of the United States, they do not control or limit the federal policy of dealing with alien property" (341 U. S. at 464).

In the present proceeding, the Custodian has exercised his power to "take over the entire fund for administration" (341 U. S. at 464). The question is how he shall administer vested funds. Hence we turn first to the policies which Congress has laid down to control the Custodian in the administration of vested enemy property, and the payment of creditors' claims out of such property.

Congress has established, in Section 34 of the Act, an administrative procedure for the payment of debt claims, with a right of judicial review confined to the district court for the District of Columbia. That procedure is available to these petitioners. Their present action, however, brought in the district court for the Southern District of New York, asserts a lien interest, said to have been acquired as a result of attachment proceedings brought in New York in 1943, which petitioners seek to recover independently of, and without regard to, the general debt claim proceedings provided by the Act. We believe that to permit such a recovery here would frustrate the purpose of Congress to preserve enemy property for equitable distribution to all creditors ratably.

The inconsistency between the disposition of creditors' claims which Congress prescribed and that for which petitioners here contend is clear: (1) where Congress limited payment of debt claims to those of American citizens, petitioners' position would require payment to alien creditors; (2) where Congress provided for equitable distribution to creditors, *pro rata*, petitioners seek payment in full without regard to claims of other creditors; and (3) where Congress established a centralized proceeding before the Custodian, with review confined to a single district court, petitioners seek payment of their claims in a separate proceeding which is not only without reference to,

but will have the effect of suspending, the general debt claim proceeding.

We may agree that all of these consequences would occur in the case of a proceeding by one who had a valid pre-freezing property interest, since to the extent of such interest the property would not be enemy and hence not within the Custodian's power to hold and administer. But petitioners, at the time of the freeze and for two years thereafter, were general creditors only. To hold that by actions taken after the freeze date they converted their position from that of general creditors to that of secured creditors, thereby acquiring all the advantages which the Act gives to secured creditors, is to say that the freeze was ineffective to maintain enemy property in *status quo*. A major purpose of the freeze, as its name implies, was to preserve the right of Congress to decide upon the disposition of enemy property, as it did *inter alia* in Section 34 which was adopted in 1946. Accordingly, the Treasury was at pains to avoid allowing any preferential payment to one creditor which might frustrate a possible Congressional purpose to provide for equitable distribution. Conditions in June and July of 1941, shortly before the outbreak of a major world war, obviously did not permit permanent legislation. The device of a freeze was used to keep enemy property intact for possible vesting in order that the legislative policies which Congress might later adopt could be applicable

to it, unprejudiced by intervening transactions.

What petitioners' contention comes down to is that the Congressional policies relating to payment of creditors' claims are made inapplicable here by post-freezing transactions for which no license was obtained. They argue that, having had on the freeze date no "interest" in the vested property which was cognizable under Section 9, they acquired such an interest, and the important rights flowing from it, by an unlicensed post-freezing transaction. We believe such a contention disregards both the language of the freezing regulations and their purpose to preserve all property for later disposition by Congress as well as for war use.

Equally invalid, we believe, is petitioners' assertion that the acquisition of such an interest was licensed. In authorizing the obtaining of state court judgments, the Treasury was not licensing the creation of new property interests which would defeat the valid claims of other creditors and frustrate the policies which Congress might adopt with respect to the disposition of enemy property. In permitting judicial establishment of the validity of a claim, it plainly did not mean to license a change in its nature from a debt claim to a property claim.

The issue here is thus fundamentally different from that in *Zittman* No. 1, 341 U. S. 446. In that case this Court expressly recognized the power of the Custodian to take over funds for administra-

tion. Here petitioners seek to end his administration of the funds and to prevent their disposition in accordance with the procedures and policies established by Congress. In that case, the Court found that recognition of an attachment "lien," as between private parties, did not infringe freezing policies, because such a lien involved no transfer of title or possession, and federal controls over payment of the funds were preserved. Here petitioners seek unqualified and absolute recovery of the entire interest in the funds, as property which they acquired, if at all, long after freezing. Such a result would frustrate the power of the United States to dispose of enemy property within its jurisdiction, and would deny the effectiveness of the freeze to preserve enemy property intact for future legislative disposition.

I. ALLOWANCE OF THE PRESENT ACTIONS WOULD CONTRAVENE THE LEGISLATIVE POLICIES APPLICABLE TO PAYMENT OF CREDITORS' CLAIMS

A. *The remedies of creditors under the Trading with the Enemy Act*

As enacted in 1917, Section 9 (a) of the Trading with the Enemy Act provided that, "any person, not an enemy, or ally of enemy, claiming any interest, right, or title * * * or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian,"

might sue the Custodian or the Treasurer of the United States therefor (40 Stat. 419, Appendix, *infra*, p. 49).

This remedy under the original Section 9 (a) was available to all non-enemies, regardless of citizenship or residence, and it was equally available whether the party claiming under the statute sought the return of a specific interest in the seized property or the payment of a debt from the former enemy owner. In either case the claimant might file suit immediately after filing a notice of claim, and upon the filing of suit the Custodian was forbidden to liquidate or otherwise dispose of the money or property sued for.

In 1920 Section 9 (e) was added. The amendment denied recovery of debt claims to citizens or subjects of countries associated with the United States in the prosecution of World War I unless in the same situation such nations afforded reciprocal rights to citizens of the United States; it limited the payment of debt claims to debts due and owing prior to October 6, 1917, and provided that debt claimants who were not citizens of the United States could not recover unless the debt "arose with reference" to the vested property.[2] 41 Stat. 977, 980.

Upon the outbreak of World War II, it was doubtful whether the remedy of Section 9 (a) con-

[2] See *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591. After 1920, further amendments were made which are not material here.

tinued available to debt claimants. Hence the Custodian paid no debt claims, although allowing them to be filed with him (testimony of Mr. James E. Markham, Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 79th Cong., 2d Sess., on H. R. 5089, p. 7). And, as we shall develop hereafter, *infra,* pp. 24–34, the Treasury Department generally denied licenses for payment of debts out of frozen enemy property which had not yet been vested.

In May 1944, the Alien Property Custodian presented to the 78th Congress a bill, H. R. 4840, providing *inter alia* for payment of debt claims; hearings were held, but the bill died. Meanwhile, this Court, in *Markham* v. *Cabell,* 326 U. S. 404 (1945), held that the remedy of Section 9 (a) was still available, but left open the question whether, in the light of the 1941 amendments to Section 5 (b) of the Act, debt claims could be satisfied. 326 U. S. at 412–413. In the 79th Congress, legislation providing for payment of debt claims was again introduced, and on August 8, 1946 (60 Stat. 925), Congress enacted Section 34 of the Act "to provide machinery for paying claims of creditors against the former owners of vested properties." Senate Report No. 1839, 79th Cong., 2d Sess., p. 2.

Section 34, Appendix, p. 51, *infra,* made important changes in the prior scheme for the payment of debt claims. Thus it restricted the class of creditors who could recover. Non-enemy creditors as a class were no longer entitled to payment

of debts out of property vested by the United States; that right was given only to citizens and residents of the United States, citizens of the Philippine Islands, and corporations organized under the laws of both nations. In addition, certain classes of persons were declared ineligible to recover debt claims, and claims arising out of actions or transactions prohibited by and not licensed pursuant to the Act were barred (Section 34 (a)).

Section 34 set up a comprehensive scheme which changed the system of the payment of debt claims from "* * * 'first come first served' to 'equitable distribution.'"[3] To implement the change, Congress provided an administrative remedy and made it exclusive for debt claimants (Section 34 (e), (f), (i)). The Custodian was to fix bar dates (Section 34 (b)), and to examine all debt claims and make a determination of allowance or disallowance in whole or in part (Section 34 (e), (f)). If the available assets were insufficient to pay allowed claims in full, *pro rata* payments were to be made, subject to certain priorities (Section 34 (f), (g)). The Custodian's determinations were reviewable in the district court for the District of Columbia (Section 34 (e), (f)). It was provided that a creditor could not compel the Cus-

[3] Sen. Rep. No. 1839, 79th Cong., 2d Sess., pp. 3–4; H. Rep. No. 2398, 79th Cong., 2d Sess., pp. 9–10.

todian to liquidate vested property in order to satisfy his debt claim (Section 34 (d)).

Section 34, as we have pointed out, was made the exclusive remedy for the satisfaction of debt claims (Section 34 (i)). However, that remedy was without prejudice to the right of any person asserting an "interest, right, or title" in vested property to proceed under Section 9 (a) of the Act (*id.*). Thus, with the passage of Section 34, the nature of the remedy available under the Act to a claimant was made dependent upon whether he had an interest in the property itself or an *in personam* contract claim[4] against the former enemy owner. *Alley* v. *Clark*, 71 F. Supp. 521 (E. D. N. Y.). No special remedy was provided for secured creditors who claimed both an interest in the property and a right against the former owner. They were given an option: they could proceed under Section 9 (a) for recovery of a property interest, or under Section 34 for recovery of a debt, or both.[5]

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[4] Cf. *Miller* v. *Robertson*, 266 U. S. 243, and *Stasi* v. *Markham*, 69 F. Supp. 163 (D. N. J.).

[5] This was the clear intent of Congress. See Senate Report No. 1839, 79th Cong., 2d Sess., p. 9, accompanying S. 2378 and House Report No. 2398, 79th Cong., 2d Sess., p. 15, accompanying H. R. 6890. Both reports stated in identical language:

"Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection (i). Such a claimant may proceed as a general creditor, thereby waiving his security. In addition or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of

The Act, as amended, specifically provided that no debt claim could be paid out of property as to which a Section 9 (a) suit was pending (Section 34 (b)). Moreover, as a practical matter, the filing of a Section 9 (a) suit for the recovery of property formerly belonging to an enemy puts a halt to the administrative processing of all debt claims which have been filed against the property. This is because the Custodian is required not only to determine the validity of claims but must also, if the vested assets are insufficient to pay all claims established, determine priorities and provide for *pro rata* payments (Section 34 (f)). Until the amount which will remain in the Custodian's hands for distribution is definitely known, it is pointless to set schedules of priorities and payments.

B. *The objectives of the present debt claims provisions*

As the foregoing summary indicates, the policies which Congress has established to govern the disposition of debt claims asserted in respect of enemy property vested during World War II reflect a substantial change from those applied during World War I. The new policies, adopted

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that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt-claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt-claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors."

after considerable deliberation,[6] embody a consistent federal program for the disposition of such debt claims. We believe Congress intended that those policies should govern all enemy property which became vested. Only those with a true "right, title, or interest" in vested assets were to be permitted recovery apart from that legislative scheme. In Part II, we set forth the affirmative grounds for our position that petitioners have no such property interest. We shall here point out the extent to which a determination that petitioners do have a "right, title, or interest" in the vested property would defeat application of the uniform federal policies adopted by Congress in Section 34.

In the first place, Congress limited payment of debt claims to those of American citizens and residents. Pointing out that available assets would in many cases be insufficient to pay American creditors, and that "to permit all friendly aliens to file debt claims might seriously reduce the general surplus of enemy assets available to this Government for ultimate disposition in the general pub-

[6] See, e. g., Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 78th Cong., 2d Sess., on H. R. 4840, *passim*; Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 79th Cong., 2d Sess., on H. R. 5089, pp. 11–14, 17, 49, 51, 62–67, 107–159; Hearings before Subcommittee of the Senate Judiciary Committee, 79th Cong., 2d Sess., on S. 2378 and S. 2039, pp. 35, 37–38, 46–50, 67–78, 85, 95–96, 104; H. Rep. 2398, 79th Cong., 2d Sess., pp. 9–15; S. Rep. 1839, 79th Cong., 2d Sess., pp. 3–9; 92 Cong. Rec. 10215–10218.

lic interest," the Committee Reports concluded that foreign creditors should "address themselves to [enemy] property" located in their own countries. S. Rep. 1839, 79th Cong., 2d Sess., p. 5; H. Rep. 2398, 79th Cong., 2d Sess., p. 11.[7] Under petitioners' view, however, a foreign creditor who obtained a post-freezing attachment could recover his debt and thereby either diminish the recovery of American creditors whom Congress sought to protect, or "reduce the general surplus of enemy assets available to this Government for disposition in the general public interest." The attachment laws of many states are available to foreign creditors as well as to Americans. Indeed, several New York attachments of frozen enemy property were obtained on behalf of English and other foreign creditors. In this connection, it may be noted that divergence in result would arise according to the state in which the creditor could find attachable assets. The effect of an attachment or garnishment differs in different states. In some states, service of a writ of garnishment or attachment is deemed to give a "lien" (which on petitioners' theory is an "interest, right, or title" under Section 9 (a) of the Act), while in other states it does not. See Justice Cardozo's dissenting opinion in *Sanders* v. *Armour Fertilizer Works,* 292 U. S. 190, 206–207.

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[7] The United States is not constitutionally obligated to "act as the collection agent for nationals of other countries." *United States* v. *Pink,* 315 U. S. 203, 228.

Secondly, and directly applicable here, it was the policy of Congress to provide for equal treatment of all American creditors. Under Section 9 (a) as applied after World War I, creditors were paid on a "first come, first served" basis. See *United States* v. *Securities Corporation General,* 4 F. 2d 619 (C. A. D. C.), affirmed *sub nom White* v. *Mechanics Securities Corporation,* 269 U. S. 283. A major purpose of Congress in adopting Section 34 of the Act was to avoid that result by providing for "equitable" distribution. The Committee Reports noted that creditors' claims against enemy property amounted to almost three times the value of the vested property of the debtors, and pointed out that "No more cogent demonstration could be made of the need for a system of pro rata payment." S. Rep. 1839, 79th Cong., 2d Sess., pp. 3–4; H. Rep. 2398, 79th Cong., 2d Sess., pp. 9–10. As the Alien Property Custodian testified in presenting the bill, a primary purpose of it was to change the law "so that the man could file his claim, but he would be paid on a ratable basis, if there is not enough money for everybody, and that we should have a marshaling of assets and a marshaling of debts, so that everybody would be treated alike and would not depend upon the time when they brought the suit or the order in which the suits were brought." Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives (79th Cong., 2d Sess.) on H. R. 5089, p. 17.

Petitioners are entitled to such *pro rata* payment under Section 34 of the Act. What they here seek, however, is not *pro rata* payment but payment in full in advance of the satisfaction of any other creditor. They seek a reward for diligence. Although on the date of freezing they were merely general creditors, they seek now to be recognized as entitled to prior payment in full, by virtue simply of their having pursued in New York, long after the outbreak of the war, the remedies which that state affords to general creditors.

A third purpose of Section 34, intimately related to the one just mentioned, was to provide for centralized administration of the debt claims program. Congress has provided a unified administrative proceeding under which the Custodian marshals all assets and adjudicates all debt claims against them, and it has limited review of this proceeding to a single court, the district court for the District of Columbia. Such a procedure is obviously necessary if a scheme of equitable distribution and *pro rata* payment is to be put into effect.[8]

[8] "Since the procedure calls for a marshaling of claims and since, on review, the court may have to give consideration to the entire account, it would cause a serious break-down in administrative and judicial procedings if debt claim determinations were reviewed by the several district courts throughout the country. It is believed that the matter must be centralized and no injustice should result." H. Rep. 2398, 79th Cong., 2d Sess., pp. 13–14; S. Rep. 1839, 79th Cong., 2d Sess., p. 7. See also, House Report, p. 12; Senate Report, p. 6.

Petitioners here, however, are proceeding in the Southern District of New York. They seek payment of their claims in advance of and without reference to action on any other debt claim. In this connection, we note that in its opinion in *Zittman* No. 2, this Court would appear to have indicated that petitioners should proceed by way of Section 34 and that their claim to priority should be left for adjudication in such a proceeding. This Court said (341 U. S. at 473–474):

> While the statute under which the funds are to be "held, administered and accounted for" authorizes the vesting of such foreign-owned property in the Custodian and its administration "in the interest of and for the benefit of the United States,"[9] it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds "shall be equitably applied" for the payment of debts.[10] If the Custodian disallows a claim, or if he disallows a claim of priority where claims exceed assets, the claimant may seek relief in the United States District Court for the District of Columbia.[11] The transfer of possession of

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[9] Trading with the Enemy Act of [Oct. 6] 1917, 40 Stat. 411, ch. 106, as amended, § 5 (b) (1), 55 Stat. 839, 50 U. S. C. App. § 5 (b) (1) [Court's footnote].

[10] *Id.* § 34 (a), 60 Stat. 925, 50 U. S. C. App. § 34 (a) [Court's footnote].

[11] *Id.* § 34 (e), (f), 50 U. S. C. App. § 34 (e), (f) [Court's footnote].

these funds does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration.

In view of these facts, we decide, and decide only, that the Custodian has power to possess himself of these funds and to administer them. To hold otherwise would be incompatible with the federal program. The consequences, if any, that flow from the substitution of the Custodian in place of the Bank as holder of the funds, upon rights derived from valid state court judgments secured by attachment, are not ripe for determination. They may never come into controversy. All questions as to the petitioners' claims, judgments, or priorities are reserved for decision in the proceedings prescribed by statute.

We do not contend that this Court thereby decided that petitioners' only remedy was Section 34; on the contrary, we believe it expressly refrained from deciding any question as to petitioners' rights or remedies where the Custodian had taken over the fund for administration. But we do suggest that in the event, and only in the event, that this Court should be unwilling now to adopt our major contention that petitioners have no right to priority of payment which the Custodian is required to recognize, either under Section 9 (a) or under Section 34, it may wish to consider the suggestion that any claim to priority

which they may have should be asserted in a proceeding under Section 34, rather than in the present proceeding. See 1 Am. Jour. of Comparative Law 395. It is true that Section 34 (g), establishing certain priorities to be observed by the Custodian, does not refer to rights claimed under attachments. But in view of the statute's general direction that vested property should be "equitably applied" to the payment of debt claims, it might be asserted that the Custodian and the reviewing courts would have jurisdiction, in a proceeding under Section 34, to consider whether any non-statutory priorities should, in equity, be allowed.[12] If they would have jurisdiction to do so, then it would seem that the question whether petitioners' attachments conferred any right to priority might well be deferred for such a proceeding. We believe, however, that in enacting Section 34 Congress was attempting to legislate comprehensively and that it did not intend to permit other priorities than those which it specified. *Cf.* H. Rep. 2398, 79th Cong., 2d Sess., pp. 14–15; S. Rep. 1839, 79th Cong., 2d Sess., pp. 8–9. We therefore do not urge this suggestion, but simply mention it as a possible basis for decision of the present case.

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[12] *Cf. Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 488–489, holding that the definitions of "enemy" in Section 2 of the Act are "merely illustrative, not exclusionary."

II. PETITIONERS HAVE NO "INTEREST, RIGHT, OR TITLE" IN VESTED PROPERTY WHICH THE CUSTODIAN IS REQUIRED TO RECOGNIZE

As we have indicated, Congress allowed one exception to its scheme for the uniform determination and equitable payment of debt claims. Section 34 (i) expressly provides that said scheme shall not prejudice the right of any non-enemy claiming an "interest, right, or title" in vested property to sue in the appropriate district court for the return of such interest. That reservation preserved the right to return of non-enemy property interests which this Court, in *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 79–80, held necessary to sustain the constitutionality of the Act.

Petitioners' reliance on that provision here is misplaced. On the freeze date this property was Japanese, and on the outbreak of war it became enemy. At that time petitioners had no interest in it. The "interest, right or title" which they claim was created, if at all, long after both the effective date of the freezing order and the outbreak of the war. What petitioners necessarily contend, therefore, is that they acquired a property interest in enemy assets, after freezing and after the war, without a federal license. We believe that such a contention disregards both the objectives and the terms of the freezing system. We shall first discuss (a) the relevant objectives

of freezing and (b) the terms of the freezing regulations, and then turn to petitioners' further contentions (c) that acquisition of the rights which they here assert was licensed and (d) that, notwithstanding the express reservations in the opinions, all of these questions were really decided in their favor in the *Zittman* cases.[13]

A. *The objectives of freezing*

As the term implies, the purpose of a "freeze" is to maintain matters in *status quo*. This Court clearly so recognized in *Propper* v. *Clark*, 337 U. S. 472, 484:

> The freezing order of June 14, 1941, immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license, until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected.

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[13] The objectives of the freezing program and the terms of the applicable regulations were extensively considered by this Court in *Propper* v. *Clark*, 337 U. S. 472, and the *Zittman* cases. So far as possible we shall, in the interest of brevity, avoid repeating what was said in the briefs for the United States in those cases (Oct. Term 1948, No. 390, and Oct. Term 1950, Nos. 298, 314, 299, and 315). Accordingly, we shall concentrate attention upon those aspects of the freezing program which appear to have special relevance to the present case in the posture in which it is now presented.

One of the clearly understood objectives of the freezing system, moreover, was, as Senator Barkley stated in 1940, "to preserve the property * * * for the benefit of Americans who may have claims" (86 Cong. Rec. 5006 (1940)). See also *Zittman* v. *McGrath*, 341 U. S. 446, 454. This objective was explicitly stated by representatives of the Treasury Department during the hearings which led to the adoption of Section 34 of the Act. At the House hearings during the 78th Congress, criticism was expressed of the failure of the bill to make any provision for payment of American creditors out of frozen assets. Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H. R. 4840, 78th Cong., 2d Sess. (1944), pp. 33–65. Mr. Ansel F. Luxford, Assistant General Counsel, Treasury Department, testified (p. 85):

> Mr. LUXFORD. We take up now one of the major problems of Foreign Funds Control, namely, that of protecting the rights of American creditors.
>
> One of the most important considerations running through the policy of the Foreign Funds Control since its very inception in April 1940 has been that of protecting the rights of American creditors.
>
> I want to emphasize, however, that we conceived our obligation as one of protecting all American creditors and not just a few.

We have always been wary of extending to any particular American creditor a privilege that we could not extend to all American creditors or one that certain creditors could enjoy only at the expense of all the rest.

Naturally, this policy will never be popular with those creditors seeking an advantage over others, but on the whole most creditors have recognized the justice of our position and the fairness with which we have attempted to deal with them all.

I think our record speaks for itself. In over 4 years of operation, during which we have been before congressional committees a dozen times, there has never been an occasion upon which anyone has seriously attempted to challenge the fairness of our dealings with American creditors.

He added (p. 99):

We are holding the assets until this Government might decide as to what it wants to do with them; the Government is the one to make the decision as to what the funds will be used for. And if the Government decides it wants to use the funds for reparations or to pay American creditors the funds will be available.

Mr. ROBSION. That was one of the purposes, so the funds could be used for American creditors, and also perhaps of equal or greater importance, to prevent them from being used by our enemies, the military, against the United States Government.

Mr. LUXFORD. Certainly, and both positions would be ones to which I would subscribe, and I think that the Congress or whatever governmental agency might decide this problem would certainly keep that matter in mind. All I am pointing out is that I do not conceive myself that anyone in the Treasury at this time could make any decision as to what will be finally done.

Mr. ROBSION. You think that the Congress will have to take some action, further action before there is any disposition of these funds?

Mr. LUXFORD. I would think that it would be the very kind of problem that Congress would want to take action on.

Mr. ROBSION. And furthermore, that you do not contemplate any disposition of these funds unless there is some action by the Congress following the peace treaty?

Mr. LUXFORD. I would think that the peace terms would take that into consideration, particularly, when you are talking about enemy assets.

Mr. MICHENER. You want to leave the funds in status quo?

Mr. LUXFORD. Yes.[14]

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[14] See also the subsequent statement of Representative Michener at pp. 100–101: "One of the real purposes of the War Powers Act, insofar as this property is concerned, was for the purpose, not only of protecting American creditors but of permitting the Government to use this property in such ways as it might think necessary in the war effort."

And see the statements of Representative Celler, the Chairman of the House subcommittee, at pp. 35–36. Re-

Similarly, Mr. Elting Arnold, Associate Chief Counsel, Foreign Funds Control, testifying before the House Committee at the 79th Congress, stated, in explanation of the Treasury's refusal to license payment out of Rumanian assets of a debt owing to a Jewish refugee: "We consider in the Treasury it is our duty as to the assets of foreign countries—we have expressed it before this committee on many occasions—to keep the assets tightly frozen until what we have always called an over-all governmental decision is made as to their final disposition." Hearings before a Subcommittee of the House Committee on the Judiciary, 79th Cong., 2d Sess., on H. R. 5089, p. 150. In its report, the House Committee recognized that "Payments from these [frozen] funds have not been made, pending an over-all governmental decision as to their ultimate disposition." H. Rep. No. 2398, 79th Cong., 2d Sess., pp. 11–12.[15]

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sponding to the assertion of Mr. Sommerich that the Treasury Department "has fixed a policy which it is not authorized to fix" (p. 35) Mr. Celler said, "Even Congress could not very well at this time determine any policy—any final policy—as to what should be done finally with either the money held by the Treasury or property or proceeds held by the Alien Property Custodian. Only a peace treaty can give a final answer. Until then we must run along as best we can." (P. 36.)

Representatives Celler, Michener and Robsion were members of the Judiciary Committee in 1941, when that committee reported out the bill which became the First War Powers Act, 1941.

[15] The Committee recommended issuance of special licenses in hardship cases, but did not indicate any disapproval of the general Treasury policy.

In short, the Treasury policy was—in the words of the House Committee (H. Rep. No. 2398, 79th Cong., 2d sess., p. 11)—one of "complete immobilization" of frozen enemy property until such time as the final disposition of that property had been determined upon. That policy extended both to a prohibition of any transfer of the property or any interest in it, and to a refusal to license payment of creditors' claims for fear of preferring one creditor over another. Not only was this policy clearly within the statutory scope of the freezing authority, but the committees of Congress and the business community were fully informed and aware of it.[16] Although that policy was criticized before the House Committee, and asserted to be beyond the authority of the Treasury Department, the Committee not only took no action on proposals to make frozen enemy property available to creditors, but senior committee members of both parties expressed approval of the Treasury policy. (See esp. fn. 14, p. 27 *supra*.)

Such a "wait and see" policy was clearly called for by the circumstances. Freezing was adopted in a time of great international flux and uncertainty. With our entry into the war, enemy property became subject to vesting. But such

[16] The existence of this policy was frequently stated and was widely understood by lawyers and businessmen. See *e. g.*, Sommerich, *Recent Innovations in Legal and Regulatory Concepts as to the Alien and his Property*, 37 Am J. Int. Law 58, 66–67 (1943); Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemp. Prob-

vesting merely took over the property for wartime use, leaving its ultimate disposition for later Congressional determination. Whether and to what extent debt claims would be satisfied out of vested enemy property was highly uncertain. It might be that Congress would decide to apply all vested property to governmental purposes, such as payment of American war claims, undiluted by allowance of any debt claims.[17] And, if debt claims were to be satisfied, the questions as to who would be eligible claimants, whether claims would be paid on a "first come first served" basis or by equitable apportionment, what priorities would be

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lems, 17, 29–30 (1945); Littauer, *The Unfreezing of Foreign Funds*, 45 Col. L. Rev. 132, 135–6, 159–60 (1945). As Mr. Charles R. Carroll, representing the National Foreign Trade Council, New York, N. Y., testified before the House Committee in 1944: "I think the business community would give you very few cases of alien funds made available for payment of American creditors. They [i. e. the Treasury Department] have taken the position they do not want to do any of that now, lest later on another legitimate creditor came along." Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H. R. 4840, 78th Cong., 2d sess., p. 50. See also testimony of Mr. Otto Sommerich, Chairman of the American Bar Association Special Committee on Custody and Management of Alien Property, *id.*, pp. 33–35. And see *id.* pp. 54, 61. See also the statements in the Brief for the United States in the *Polish Relief* case, quoted *infra*, p. 38.

[17] Compare the Beckworth amendment to the War Claims Act, which would have postponed all payment of debt claims until six months after the War Claims Commission had filed a report on the whole war claims problem. The amendment passed the House, 94 Cong. Rec. 573, but was deleted by the

applied, etc., were all undetermined. These issues were not resolved until Congress added Section 34.[18]

Much property that was frozen was potentially vestible. The Custodian obviously could not vest everything at once; indeed, vesting of certain types of property, notably cash and securities, did

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Senate 94 Cong. Rec. 8759, and dropped in conference. 94 Cong. Rec. 9291.

It is clear that there is no constitutional obligation to pay debt claims of general creditors. *Kogler* v. *Miller*, 288 Fed. 806 (C. A. 3). *See Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497; *Banco Mexicano* v. *Deutsche Bank*, 289 Fed. 924, 928 (C. A. D. C.), affirmed, 263 U. S. 591; *Sutherland* v. *Norris*, 24 F. 2d 414, 415 (C. A. 3), certiorari denied, 277 U. S. 602; *Synthetic Patents Co.* v. *Sutherland*, 22 F. 2d 491, 494 (C. A. 2), certiorari denied, 276 U. S. 630.

[18] Section 34 was part of a three-pronged legislative scheme for the disposition of enemy property. The other two prongs were: (a) provisions for the return of property to nationals of enemy-occupied countries, Italians, and victims of discrimination, embodied in Section 32 of the Act as added March 8, 1946, 60 Stat. 50, and amended in 1946, 1947 and 1950, 60 Stat. 930, 61 Stat. 784, and 64 Stat. 1080; and (b) the provision prohibiting return to German and Japanese nationals and providing for the payment of the net proceeds of vested property of such nationals into a fund for war claimants, embodied in Section 39 of the Act, as added by the War Claims Act of July 3, 1948, 62 Stat. 1240. All three prongs of this program were under approximately simultaneous consideration by Congress. Thus the provisions which became Sections 32 and 34 of the Act were first introduced in May, 1944, as parts of H. R. 4840, 78th Cong. 2d Sess., while the proposal to make vested German and Japanese property available for payment of war claims was first introduced on November 15, 1943, as H. R. 3672, 78th Cong. 1st Sess. See Gearhart, *Post-war Prospects for Treatment of Enemy Property*, 11 Law and Contemp. Problems 183 (1945).

not begin until June 1945.[19] Plainly, the inevitable delay in vesting some property should not be allowed to have the effect of reducing the amount ultimately available for governmental purposes. Equally plainly, it would be inequitable to let the extent of creditors' rights depend upon the time when the particular debtor's property was vested.

We believe it was a major purpose of freezing to avoid such inconsistency of treatment. Freezing and vesting, both done under authority of Section 5 (b) of the Act, were cognate parts of an integrated program. The 1941 amendments to Section 5 (b) were designed to establish "a complete system of alien property treatment" under which the President would have "flexible powers * * * to deal with the problems that surround alien property or its ownership or control in the manner deemed most effective in each particular case." H. Rep. 1507, 77th Cong., 1st sess., p. 3. In the case of enemy property, freezing thus became a means of preserving the availability of the property for vesting and for the application to it

[19] The classes of property which were to be vested were defined in Executive Order 9193, July 6, 1942, 7 F. R. 5205. That Order was amended on June 8, 1945, Executive Order 9567, 10 F. R. 6917, to provide for vesting of enemy cash and securities. Cash and securities had not been vested previously because they did not call for affirmative administration to the same extent as business enterprises, patents, vessels and interests in decedents' estates.

of whatever policies Congress might establish for vested property.[20]

In this aspect, the freezing regulations, as applied to enemy property, are but an extension of principles established as early as the Civil War. In cases arising under the Confiscation Act of 1862, this Court held that transfers *pendente bello* of enemy property were subject to be set aside or disregarded when the United States decided to exercise its sovereign power of seizure. *Corbett* v. *Nutt,* 10 Wall. 464, 478; *Conrad* v. *Waples,* 96 U. S. 279, 287. Like principles were applied to a transfer made during World War I. *Schrijver* v. *Sutherland,* 19 F. 2d 688 (C. A. D. C.) The basis of this rule is that such a transfer, if given effect, would deprive the United States of its sovereign power to seize all enemy property and apply it in the interest of

[20] See *Propper* v. *Clark,* 337 U. S. 472, 483–484: "The plan for prohibition of unlicensed transactions by foreign nationals comprehends blocking of transfers of credits and vesting of local assets of such nationals under the Trading with the Enemy Act and regulations thereunder. If transactions are blocked, vesting may or may not follow. When the Custodian vests blocked property, title passes to the Custodian and his authority to vest and hold cannot be questioned except as provided in the Trading with the Enemy Act. The freezing order of June 14, 1941, immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license, until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected."

the United States to such purposes as Congress might direct. One effect of the freezing regulations was to make these [redacted] prohibitions more explicit, and to advance the critical date of their applicability to the date of a freezing order adopted in anticipation of and not long before the actual outbreak of war.[21]

The present case aptly illustrates the point. Petitioners got their attachment on June 28, 1943. If their debtor's property had been vested on the outbreak of the war—as it constitutionally could have been—they would clearly be general creditors, whose rights were limited to those afforded by Section 34. That they are here claiming greater rights is the result of the fact that not all of enemy property was or could be vested immediately upon the outbreak of the war. Their contention is that they should be allowed to benefit by the delay in vesting. It was a major purpose of freezing to preclude any such consequence.

B. *The terms of the freezing order*

The effectuation of these policies was clearly within the scope of the freezing order. Section 1 of that order (Executive Order 8389, as amended by Executive Order 8785, 6 F. R. 2897, Appendix, pp. 60–61, *infra*) prohibits, *inter alia*, except as licensed,

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[21] This effect of freezing was clearly within the war powers of Congress. See *Propper* v. *Clark*, 337 U. S. 472, 483 n. 16.

> All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States

if such transactions involve property of a foreign national. Clearly, the credits owing to Sanko on the books of the Anderson, Clayton & Company were "evidences of indebtedness" within the meaning of this provision. And we think it cannot seriously be disputed that the acquisition by petitioners of an "interest, right, or title" in enemy property would be a "transfer" within the meaning of the order. As this Court held in *Propper* v. *Clark*, 337 U. S. at 486:

> The language of the order prohibits more than payment. It prohibits transfers of credit.[22]

Prior to the 1943 attachments, petitioners were mere creditors, having an *in personam* contract claim but no property interest in any identified property of their debtor. Cf. *Miller* v. *Robertson*, 266 U. S. 243; *Stasi* v. *Markham*, 69 F. Supp. 163 (D. N. J.) They claim that as a result of those attachments, they acquired an "interest,

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[22] See also *Zittman* v. *McGrath*, 341 U. S. 446, 448: "The general effect of the basic order was to forbid 'transactions' in the assets of blocked nationals, including all 'transfers' of such funds."

This effect of the order is confirmed by General Ruling No. 12, pars. (1) and (5), 7 F. R. 2991, *infra*, pp. 61, 63-64.

right or title" in specific property so as to entitle them to a return of that property. Since by the terms of Section 9 (a) they can recover only upon a showing that they have a property interest which they concededly did not have on the date of the freezing, petitioners cannot escape the necessary conclusion that a license or other authorization was needed.[23]

C. *The assertion of a license*

Petitioners assert that by General Ruling No. 12, and the accompanying practice of the Treasury Department, creation of such an interest here was licensed. We believe the assertion disregards the distinction between the validity of a judgment and the effect of a judgment. We do not dispute that the attachment was effective to prevent transfer of the fund to any other person (cf. *Zittman* v. *McGrath*, 341 U. S. 446, 450, 463),

[23] Petitioners suggest that it is not necessary that they have a present "interest, right, or title" and that something which, if licensed, might ripen into such an "interest, right, or title" would give them standing in this action (Br., pp. 11–12). They rely in this connection on *Kaufman* v. *Societe Internationale*, 343 U. S. 156, which held that actual (not potential) stockholders of a corporation could intervene in the corporation's suit under Section 9 (a) in order to protect any interest which they might have adverse to the corporation. We think it clear that standing under Section 9 (a) must rest upon an existing interest. Thus, it has been held that a claimant whose "interest" arose through an unlicensed voluntary transfer might not recover under Section 9 (a). *Okihara* v. *Clark*, 71 F. Supp. 319 (D. Hawaii); *Blank* v. *Clark*, 79 F. Supp. 373 (E. D. Pa.); *Heyden Chemical Corp.* v. *Clark*, 85 F. Supp. 949 (S. D. N. Y.). And see, *State of the Netherlands* v. *Federal Reserve Bank*, 99 F. Supp. 655 (S. D. N. Y.), affirmed on this point by the Court of Appeals for the Second Circuit, January 21, 1953, Docket No. 22328.

except, of course, to the Custodian in the exercise of his paramount right to take over the fund (341 U. S. at 464). And we are not here concerned with what the respective rights of petitioners and the enemy debtors might have been, but for the vesting. The only question here is whether petitioners' attachments could create an "interest, right, or title" in specific property by virtue of which they may terminate the Custodian's power of administration over it and secure its specific return to them without regard to the federal policies applicable to vested enemy property.

We think it clear that the Treasury did not intend to license the creation of such an interest. It wished to permit judicial determination of the rights of the parties, but in so doing it was at pains to prevent such a determination from defeating the federal policies which Congress might determine to make applicable to enemy property.

Thus, paragraph 4 of General Ruling No. 12, 7 F. R. 2991 (Appendix, *infra,* p. 62), while providing that transfers involved in or arising in judicial proceedings shall "be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated," further provides that such transfer shall confer no "greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner

of such property could create or confer by voluntary act prior to the issuance of an appropriate license." [24]

[24] The purpose and effect of this provision were thus described in Public Circular No. 31, August 2, 1946, 11 F. R. 8351:

"(3) An attachment is a 'transfer.' See paragraph (5) of General Ruling No. 12 where the term 'transfer' is defined as including 'the issuance, docketing, filing, or other levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment.' *An unlicensed attachment, therefore, cannot operate to transfer or create any interest in blocked property.* Nor can it serve as a basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

"(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property. Thus, the proviso of paragraph (4) specifies that 'no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.' *In issuing paragraph (4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor*

In its brief to the New York Court of Appeals in the *Polish Relief* case, the United States pointed out that:

> Freezing control was intended to protect American creditors and any validation by the courts of unlicensed assignments and transfers of blocked assets will go far toward preventing any future settlement on an equitable basis.[25]

While suggesting that attachment of "the national's contingent power (i. e., contingent upon Treasury authorization) to transfer all his interest in the blocked account"[26] might afford a basis for state court jurisdiction, the United States emphasized that:

> The Federal concern is that the effect, if any, of the attachment be in complete subordination to the Federal control over the assets involved. *If that paramount control be unimpaired,* any useful effect of the attachment which the Court finds permissible under New York statutes, whether as a basis for jurisdiction or otherwise, is outside the scope of the limitations of the Fed-

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could it be the basis for the assertion or recognition of any other right, remedy, power, or privilege with respect to the property." [Italics added.]

[25] Brief for United States of America as *amicus curiae*, p. 12, *Commission for Polish Relief, Limited* v. *Banca Nationala á Rumaniei*, 288 N. Y. 332, 43 N. E. 2d 345 (1942). Copies of this brief were filed with the Court in the *Zittman* case.

[26] *Id.*, at 52; see 341 U. S. at 455.

eral foreign funds legislation. [Italics added.]

Accordingly, it insisted that "while the Federal restriction may leave some scope for the operation of state attachment laws, *e. g.*, insofar as the attachment provides a jurisdictional basis for judgment, the attachment under state laws must fall short of creating any legal interest or relation that collides with the Federal regulation of foreign-owned property."[27] To the same effect see letter of Randolph Paul, General Counsel, U. S. Treasury Dept., *American Banker,* Dec. 11, 1942, p. 3.[27a] We submit that petitioners' contention

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[27] *Id.*, 38; see also p. 53.

[27a] A similar expression of the view that judgments in unlicensed attachment actions should not be allowed to create rights of priority to the detriment of other creditors, was made by Mr. Luxford, at the House hearings on a predecessor to the bill which was enacted as Section 34. In discussing the Treasury's policy of seeking to protect not merely some but all American creditors, Mr. Luxford stated (House Hearings cited p. 25, *supra*, at p. 97):

"A third illustration is the fact that we have never in any way attempted to prevent any creditor from going to court and getting a judgment against his debtor, even though the debtor was in enemy occupied countries, such as Norway and France.

"However, in all these cases we have not permitted the judgment to be satisfied out of blocked assets of nationals in enemy or enemy occupied countries except where the plaintiff could establish ownership to specific property in an account. We have advised all such creditors that they would have to wait until communications were again open with the occupied country.

"The reasons are obvious enough upon reflection. In most cases there is no personal service on the defendant at all;

here, if allowed to prevail, would plainly collide with that federal regulation and impair the paramount federal control.[28]

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suits usually are the result of attachment actions; and secondly, the defendant had no way of knowing he was being sued, or any way of defending if he did happen to know it.

"Third, judgment in the case was usually by default and pursuant to ex parte proceedings.

"Fourth, if we could be satisfied that the claim was bona fide and the evidence was conclusive there are further problems: In the first place *most claims were those of general creditors, and there is no way for us to know what other creditors had claims against the same debtor, or whether the debtor was bankrupt or not.* These reasons were most compelling in our opinion whether the debtor was in enemy or enemy-occupied territory and *quite apart from elements of duress.*" [Italics added.]

Accord: Reeves, *Control of Foreign Funds*, 11 Law and Contemp. Problems 17, 44–49; Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N. Y. L. J. 2180, 2200 (1945); Berger and Bittker, *Freezing Controls: The Effect of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947).

[28] Petitioners and the *amici curiae* assert that the policy of both the Treasury and the Custodian has been inconsistent, and refer to specific instances in which payments to creditors out of blocked or vested property were permitted. Of course, the grant of a license in one case does not imply a license in another case, and the record is clear that specific applications to license payment of the claim of these petitioners have been denied. We wish, however, to comment on the suggestion that the federal agencies involved have acted arbitrarily and inconsistently.

As stated in this brief, it has been the general policy of the Treasury Department to refuse to license payment of creditors' claims, or the accrual in favor of creditors of any right, where there was any likelihood that such action would either result in a preference over other creditors, or dilute the amount of property available for vesting and use in the inter-

D. *The effect of this Court's decisions in the Zittman cases*

Petitioners argue that this Court's prior decisions in the *Zittman* cases are conclusive of the issues here (Br. pp. 8–11). This argument in effect denies any force to the express reservations which the Court made in the *Zittman* cases.

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ests of the United States. In accordance with the clear intent of Congress, this licensing policy was not applied with rigid inflexibility; exceptions were made where special circumstances appeared to warrant them. Thus, the fact that in some cases payment to attaching creditors was licensed by the Treasury (Br. for Leo Zittman, *amicus curiae*, p. 11) should not occasion surprise in view of the announced policy of the Treasury (a) to treat frozen foreign property differently from frozen enemy property (see Testimony of Mr. Luxford, Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 78th Cong., 2d Sess., on H. R. 4840, pp. 97, 107, 111; Reeves, *The Control of Foreign Funds by the U. S. Treasury*, 11 Law & Contemp. Problems 17, 26–31 (1945); see, *e. g.*, the license and payment out of French property, referred to at pp. 66, 69–70, in the record in the *Zittman* cases); and (b) to allow "American creditors to get paid for current transactions in the process of completion at the time we issued the [freezing] order" (Testimony of Mr. Luxford, *supra*, p. 96; see Reeves, *supra*, p. 27). It was for similar reasons that the Alien Property Custodian issued a license to Banque Mellie Iran permitting it to withdraw from a bank in New York funds deposited with that bank not long before freezing. See *Lyon* v. *Singer*, 339 U. S. 841.

Similarly, while it has been the general policy of the Custodian to deny validity to unlicensed attachment liens, he has on occasion, in the exercise of his power to compromise litigation, permitted payment on such liens. Thus, the case of *Murphy* v. *I. G. Farben-industrie, A. G.*, Supreme Court, New York County, Index No. 11346/1941, referred to in the briefs in the *Zittman* cases, has recently been settled by allow-

In *Zittman* No. 1 this Court had before it a vesting order by which, as it construed the order, the Custodian "put himself in the shoes of the German banks" (341 U. S. at 463), and presented for determination the question "whether any valid interests as against anyone were created by the attachments." (341 U. S. at 473.) It rejected the Custodian's position "that no valid rights *against the German debtors* were acquired by the attachments", and held that "*As against the German debtors,* the attachments and the judgments they secure are valid" (341 U. S. at 463–464; italics added). In effect, it considered the issues before it as if there had been no vesting and the action was one between private creditor and private debtor.[29] It held merely that the Treasury regulations did not preclude the creation by attachment of a lien on frozen property, whether foreign or enemy, which would be valid as between private parties.

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ing the attaching creditor to retain about 6% of the amount attached. In *Murray Oil Products* v. *Mitsui and Co., Ltd.*, 55 F. Supp. 353 (S. D. N. Y., 1944), affirmed, 146 F. 2d 381 (C. A. 2, 1944), the Custodian, after having authorized the enemy debtor to defend on the merits, permitted satisfaction of the district court's judgment in full because he and the Department of Justice did not deem that case a suitable vehicle in which to make the first test of the validity of unlicensed New York attachments.

[29] Mr. Justice Reed and Mr. Justice Burton differed with the majority primarily on this question of the construction of the vesting order (341 U. S. at 466–468).

In doing so, however, it expressly reserved the question whether such a lien would be valid as against the Custodian. It said that "of course, as against the Custodian, exercising the paramount power of the United States, they [the attachments] do not control or limit the federal policy of dealing with alien property" (341 U. S. at 464).

And in *Zittman* No. 2, where the Custodian had taken over the fund for administration, the Court said "All questions as to the petitioners' claims, judgments, or priorities are reserved for decision in the proceedings prescribed by statute" (341 U. S. at 474; see also 341 U. S. at 464).[30]

We do not see how this express reservation of "all" questions as to the petitioner's "claims, judgments, or priorities", can possibly be read as an adjudication that the Custodian must recognize a lien and allow a priority. On the contrary, it is a clear reservation of the very issue which we have here, namely, whether, regardless of what the rights of private parties might be, the Custodian is entitled and indeed required to treat these petitioners as general creditors in view of the controlling policies which Congress has laid

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[30] Zittman, appearing here as *amicus curiae*, argues that "What *Zittman No. 2* thus left open, *Zittman No. 1* concluded." (Brief amicus, p. 8.) We trust that it is unnecessary for us to defend the Court from this suggestion that it was playing games with counsel.

down with respect to the satisfaction of creditors' claims out of vested enemy assets.[31]

Petitioners attack the distinction which this Court drew by asserting that "'validity' is not a fissionable concept" (Br. p. 10). We believe, on the contrary, that there is nothing unusual about the notion that rights conferred by state law may be recognized when they do not infringe upon paramount federal policies, but disregarded when they do. Cf. *United States* v. *Pink*, 315 U. S. 203. In this very context of enemy property the courts have held that transactions which may be valid *inter partes* are subject to being disregarded by the sovereign where they conflict with legitimate sovereign interests. In cases arising under the Confiscation Act of 1862, this Court held that transfers made *pendente bello* of enemy property, although they might be good as between the parties, were "void" as against the United States

[31] The distinction was clearly stated in the concurring and dissenting opinion of Mr. Justice Reed: "In my judgment a valid state attachment, obtained subsequent to the blocking order, is good as between an alien and his creditors. I am also sure that such an attachment has no compelling power upon the Attorney General in his administration of the Trading With the Enemy Act" (341 U. S. 468). As we read the majority opinion, it does not reject this view, but reserves decision on it until the question should be presented in a case such as this. It was apparently because of this reservation that Mr. Justice Reed in his concuring and dissenting opinion stated: "The Court fails to decide the only question of importance presented by this case" (341 U. S. at 465).

when it decided to exercise its sovereign power of seizure. *Corbett* v. *Nutt*, 10 Wall. 464, 478; *Conrad* v. *Waples*, 96 U. S. 279, 287. See also *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C. A. D. C.). Accordingly, the issue here is whether the effect which petitioners would attribute to their state court attachments contravenes paramount federal policies.

The ground of this Court's decision in the first *Zittman* case was that to give effect to the unlicensed attachments as a lien, as between private parties, would not defeat the purposes of the freezing controls. The Court pointed out that under New York law an attachment of bank accounts, unlike the receivership involved in *Propper* v. *Clark*, 337 U. S. 472, did not transfer either possession or title to the sheriff but served merely to prohibit the person served from transferring the funds (341 U. S. at 450). "The effect of the State's action, like that of the federal, was to freeze these funds," 341 U. S. at 463. Because its effect was thus limited, and because the attachment proceedings "do not purport to control the Custodian in the exercise of the federal licensing power, or in the power to vest the *res* if he sees fit to do so for administration" (341 U. S. at 463), it concluded that to recognize the attachment lien as between private parties was not inconsistent with the freezing program or with its decision in *Propper* v. *Clark*, *supra*.

Petitioners' present contention, however, presents a very different issue. They now seek, not recognition of a lien which freezes the funds so as to prevent a private transfer of them, but recovery from the Custodian of the entire interest in the funds. Although this Court's decisions in *Zittman* left unimpaired the power of the Custodian to take over the funds for administration, petitioners by their present action seek to terminate his administration of them and to deny the application to those funds of the policies which Congress has prescribed to govern the disposition of vested enemy assets. To award them the relief which they here seek would render meaningless the reservation in the *Zittman* cases of the Custodian's power to take over the funds for administration, since on petitioners' theory the day after he got possession of the funds they could sue for return, thus immediately enjoining him from doing anything with the funds, and ultimately taking them out of his hands again. Indeed, on their view, even the Custodian's power to license or refuse to license payment would be defeated, for Section 9 (a) by its terms appears to require immediate satisfaction of any judgment thereunder (see Appendix, *infra* pp. 50–52).[32] As one commentator has aptly said: "Such a suit would

[32] Thus, the judgment of the district court (R. 47) is an unqualified judgment that the Custodian pay to petitioners $20,714.84, with interest, poundage fees and costs.

appear to be an attempt to force the issuance of a license with judicial aid." 1 Am. Jour. of Comparative Law 397, 398.

To permit petitioners' present action to prevail would be to say that the effect of the state court attachment was to remove all federal freezing controls over the funds and to entitle the attaching creditor unqualifiedly to payment in full of his default judgment. Such a result would ignore the careful reservation of paramount federal powers which the Treasury repeatedly made, and would totally defeat the application to these frozen enemy funds of the policies prescribed by Congress in Section 34 for the disposition of enemy property.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*:

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Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States;

and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * * *

Sec. 9. [as amended by 42 Stat. 511, 45 Stat. 271, 50 Stat. 784] (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor

by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as

provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

(e) No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States * * *; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928.

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

* * * * *

SEC. 34. [as added by the Act of August 8, 1946, 60 Stat. 925] (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1–6 of the Criminal Code (18 U. S. C. 1–6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be in-

cluded for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication

of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof

to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by

him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence

with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the

claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided,* That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed

with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * * * *

SEC. 39. [as added by the Act of July 3, 1948, 62 Stat. 1240, 1246] No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal

or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property of 1946.

* * * * * *

2. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

* * * * * *

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking insti-

tution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

3. General Ruling No. 12, April 21, 1942, 7 F.R. 2991:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was

in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by volun-

tary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power: *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book

credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

* * * * *

4. Assets of and claims against Sanko Kabusiki Kaisya (formerly C. Itoh & Co., Ltd.) received by and filed with the Office of Alien Property.

a. Assets (Account No. 39-21639)—$36,236.02.

b. Claims—$192,371.38 identified by the following Notice of Claim numbers:

1307—$528.25 claimed by James E. Fox & Co. as reimbursement for payment of customs duties.

2022—$20,714.84 claimed by Orvis Bros. for margins in connection with cotton futures.

4044—$6,717.22 claimed by Jenks Gwynne & Co. for margins in connection with cotton futures.

8723—$26,499.01 claimed by Bond, McEnany & Co. as liability on loan account covering cotton transactions.

18940—$136,546.96 and Yen 100,056.11 claimed by Yokohama Specie Bank for liabilities on bills of exchange.

33489—$415.51 claimed by Hunt, Hill & Betts for fees for legal services.

33853—$174.37 claimed by John J. McCloskey for poundage fee.

34646—$648.95 claimed by National City Bank for liabilities for bills of exchange.

39371—$126.27 claimed by Attorney General for collection expenses.

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